Petition

81-1166

No.

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IN THE

Supreme Court of the United States

October Term, 1981

JACQUES SYL KNITWEAR, INC. and BIQUETTE, INC.,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD and LOCAL 162, INTERNATIONAL LADIES' GARMENT WORKERS' UNION,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

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The Questions Presented for Review.

I. Whether the decisions below violated (a) due process under the Fifth Amendment of the United States Constitution and (b) meaningful access to the court under the First Amendment by approving Respondent's usurpation of the power to rescind the involved Settlement Agreement without statutory authorization, without fair hearing and without sworn testimonial evidence?

II. Whether Petitioners' interest in the signed Settlement Agreement is a "property" interest which could not lawfully be confiscated by Respondents without due process?

III. Whether, since there was no statute to rely on, Respondent violated due process by gross impairment of Petitioners' contract rights on the basis of its own improvisation of uncodified regulation and on the basis of arbitrary discretion disregarding established, applicable principles of contract law.

IV. Whether the Court below committed reversible error in approving the conclusion of law called a "finding" in its Judgment Order?

V. Whether important questions of federal law (access to the courts and due process) in this case have not been, but should be, settled by this Court?

VI. Whether an important question of due process pertaining to Petitioners' right to fair hearing has been decided below in a manner which conflicts with applicable decisions of this Court.

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No.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JACQUES SYL KNITWEAR, Inc. and BIQUETTE, Inc.,

Petitioners,

against

NATIONAL LABOR RELATIONS BOARD and LOCAL 162, INTERNATIONAL LADIES' GARMENT WORKERS' UNION,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Judgment Order Below

The Judgment Order of the United States Court of Appeals for the Third Circuit is not yet officially reported; it is copied in the Appendix (1a-3a).*

* Arabic numbers followed by the letter "a" indicate pages of the Appendix annexed to this Petition. Arabic numbers without "a" indicate pages of this Petition.

Statement of the Grounds on Which Jurisdiction of This Court is Invoked

(i) Date and Entry of Judgment Order Below

The Judgment Order (1a-3a) was made and entered on October 14, 1981.

(ii) Jurisdiction

The Statute conferring jurisdiction on this Court is 28 U.S.C. §1254(1).

(iii) Constitutional Provisions Involved

Amendment I, Constitution of the United States

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V, Constitution of the United States

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 101.9, *Settlement after Issuance of Complaint,* is copied in the Appendix (93a-95a).

(iv) Statement of the Case

All of the material facts and events in this case occurred between April 16, 1979, when settlement negotiations (54a-56a) began, and July 3, 1979, when the ALJ rendered his "Ruling and Order" (86a-92a) cancelling the Settlement Agreement (59a-64a). What occurred after the cancellation is epilogue: the ALJ's decision (4a-38a) dated September 28, 1979, the decision (39a-53a) of the National Labor Relations Board dated February 29, 1980, and the Judgment Order of the Third Circuit (1a-3a) made and entered October 14, 1981——all these were based entirely upon what the parties and the ALJ did between April 16 and July 3, 1979. What occurred before April 16, 1979, was disposed of by the settlement (57a-58a).

Diary of Significant, Material Facts and Events in 1979.

1. *April 16:* Having heard that Petitioners intended to call at least 33 witnesses, the ALJ proposed settlement to the parties (78a). Among other things, he suggested that the Union and Petitioners "in the representation case, each agree to withdraw their respective challenges" (56a). They did agree (56a). Counsel for Petitioners had earlier disputed the Regional Director's disposition of challenges (which in any event the Settlement Agreement) superseded by his objections (5a) to the election, his letter dated September 22, 1978, and his Answers (5a) to the NLRB Complaints dated October 23, 1978 and November 13, 1978 (41a-42a). No one said or intimated that the challenges should be confined to "some," "several" (66a), "undisposed" (78a), "thirteen" or "unresolved" (81a) challenges.

2. *April 17:* The parties signed (62a) the Settlement Agreement containing only *one* clause (61a) which subsequently became the subject of disputed (42a, 61a, 69a,

79a) interpretation; viz.: "the parties withdraw their respective challenges in 22-RM-533" (hereinafter the "disputed clause"). No one asked for any change in this clause or suggested lack of "meeting of minds" on it (57a-58a). The signatories (62a), all lawyers, who had scrutinized the Settlement Agreement before signing it, were: (I) Ms. Balzano and (II) Ms. Mattina, the two Counsel for the General Counsel, (III) Melvin Gelade, Counsel for the Union, (IV) the ALJ himself, and (V) Godfrey P. Schmidt, Attorney for Petitioners. Respondent admits that General Counsel recommended approval of the Settlement Agreement (42a). The Regional Director also had approved the Settlement Agreement (94a-95a). None of these signatories at any time prior to June 19, 1979, had proposed any correction or emendatory interpretation, of any part of the Settlement Agreement. Counsel for the General Counsel, the ALJ and the Regional Director, as guardians of the public interest and of the policy of the NLRA, had discharged their special duty under said interest and policy (57a-58a; 94a-95a) by approving the settlement. They were themselves the scrivenors of the Settlement Agreement and had offered it to Petitioners on April 17, as the settlement. Petitioners accepted the offer orally and in writing: after reading it carefully, they signed it by their attorney (62a). So did the others (62a).

3. *April 23:* The Regional Director sent to Petitioners, among others, a letter (65a-66a) calling for a meeting on April 26th to implement the Settlement Agreement. His letter correctly repeated the substance of the disputed clause; but, by adding to it a reference to the challenges of "several individuals" instead of to all of them, he misinterpreted it (62a).

4. *April 25:* Petitioners' attorney objected by telegram to this misinterpretation. (There had been an irrelevant, unauthorized intervention on this day by another attorney

not in any way associated with Mr. Schmidt, who alone represented Petitioners at all material times. In violation of the *Code of Professional Responsibility,* Counsel for the General Counsel complicated matters for a while by recognizing this interloper and his mailgram.)

5. *April 29:* In response to Mr. Schmidt's telegram, Ms. Balzano phoned his office to say only that the meeting scheduled for April 27th had been postponed "indefinitely."

6. *April 30:* The two Counsel for the General Counsel moved (67a-71a; 42a) to reopen the record and resume the trial on the basis of a never unsupported and false allegation (thereafter completely disregarded by them) that Petitioners had failed to "comply" with the Settlement Agreement and their "obligations" under it (67a, 70a). The motion papers admit that the "settlement provided * * * for the withdrawal of the parties' respective challenges in Case No. 22-RM-533" (69a). The motion papers do not allege anything about "meeting of minds" or any "understanding" by the Counsel for the General Counsel on April 17 at variance with the disputed clause [item 2 *supra* (3)]. The motion papers did not specify nor describe the nature of the non-compliance falsely attributed to Petitioners and never thereafter even mentioned by them. However, they stated erroneously that Mr. Schmidt as counsel for Petitioners had sent telegrams (he had sent only one) which claimed that the Settlement Agreement was "null and void." He had made no such claim, ever. It was unprofessional of Counsel for the General Counsel to have given credence to a mere interloper's meddling.

7. *May 8:* Petitioners submitted timely affidavits refuting General Counsel's misrepresentations and denying the unsupported charge that Petitioners had failed to comply with the Settlement Agreement (59a-64a). That

charge, nevertheless, impliedly affirmed General Counsel's belief in the validity of the Settlement Agreement and of Petitioners' "obligations" under it (70a).

8. *May 11:* The ALJ, admittedly without reading "Petitioners' opposing affidavits, granted (72a-73a) General Counsel's motion aforesaid without a hearing. Petitioners received the ALJ's Order (72a-73a) on May 19. It declared the Settlement Agreement "inoperative" and ordered resumption of the trial, despite the Settlement Agreement. The Order (72a-73a) said nothing about failure of "meeting of minds" or about an undisclosed "intention" or "understanding" contradicting the disputed clause.

9. *May 29:* Mr. Schmidt's Supplemental Affidavit in opposition to General Counsel's motion was filed. On the same day the ALJ issued a new Order (74a-75a) for a "hearing" on June 19, "limited to matters raised by Mr. Schmidt's affidavit of May 8, 1979, namely, the Settlement Agreement." This limitation imported no notice of cancellation; since Mr. Schmidt's affidavits had repeatedly contended that the Settlement Agreement was a valid obligation of all parties, with which Petitioners were happy to comply.

10. *June 19:* The "hearing" called for this day proved to be nothing more than a colloquy, largely about interpretation of the disputed clause [item 2, *supra* (3)], between the ALJ and counsel for the parties. There was no discussion of General Counsel's motion (67a-71a), no testimonial evidence, no cross-examination, no trial of any issue, no adequate legal argument on interpretation and no disclosure by the ALJ that he was considering rescission of the Settlement Agreement or that he intended to hear legal argument on rescission. The ALJ isolated the question before him: "The question then is whether or not the phrase [the disputed clause] means to withdraw all

challenges, or to withdraw only the unresolved challenges. That's the question" (80a). This statement, too, indicated that the ALJ was basically concerned with interpretation. Later in the colloquy the ALJ asked: "Why then isn't it reasonable to argue that it [the disputed clause] means just what it says, namely to withdraw all charges?"(81a) The ALJ's preoccupation was with interpretation. The colloquy provided, for the first time, the setting for the bare, unsworn assertion of Counsel for the General Counsel that "there was no meeting of minds" (82a) on the disputed clause because of an alleged, but never—before—revealed "understanding" (78a, 83a) of the Union attorney and of the two Counsel for the General Counsel on April 17. The unsworn, false allegation in General Counsel's motion papers that Petitioners had failed to comply with the Settlement Agreement was never mentioned by anyone. After the hearing was closed, the AJL asked Petitioners to consider a second settlement proposal, based on General Counsel's belatedly revealed "understanding" (belied by the language of the disputed clause). Petitioners were asked to notify the ALJ as to their reaction to that second settlement proposal.

11. *June 25:* Mr. Schmidt wrote to the ALJ and the parties his letter rejecting such a resettlement of the "Settlement Agreement," saying among other things:

> "We cannot believe that the lawyers who drafted the written settlement would have allowed therein anything that they did not intend to say, or that they suppressed or left unsaid any modification or condition which affected the meaning they intended to convey. * * * They never in any way put my clients or me on notice that they were assuming that the "challenges" mentioned were less in number than the challenges in 22-RM-533. To have left such an assumption unexpressed, when they

> were (allegedly) relying on it, would have been tantamount to deception. * * *"

No one answered that letter.

12. *July 3:* The ALJ issued his *Ruling and Order* (86a-91a) based on the colloquy of June 19th. That Ruling (grounded on no statute, no fair hearing or trial, no testimonial evidence subject to cross-examination and no notice of hearing concerning cancellation) is the crux and the cause of the constitutional controversy in this case (42a-43a). It was affirmed on February 29, 1980, by the NLRB (39a-53a) and on October 14, 1981 by the Court below (1a-3a).

13. *July 11:* Mr. Schmidt filed his "Appeal Brief of Employers [Petitioners]" with the National Labor Relations Board (42a) seeking stay of the trial and reversal of the ALJ's rescission of the Settlement Agreement by his *Ruling and Order.*

14. *July 17:* The two Counsel for the General Counsel by their *Memorandum of Opposition* opposed

> "Respondent's [Petitioners'] request to the Board for a stay of hearing * * * and urge[d] a denial of respondent's request for leave to appeal and its appeal from Administrative Law Judge's ruling withdrawing approval of the informal Settlement Agreement and ordering a resumption of the hearing" (42a).

The formula: "withdrawing approval of the informal Settlement Agreement" (42a) is a euphemism for the ALJ's stark cancellation of the Settlement Agreement on July 3 without statutory authorization. In the *Memorandum of Opposition* it was claimed "Great delay has already been

caused by Respondent's refusal to comply [with the Settlement Agreement] based on what General Counsel considers its reasonable interpretation of [the disputed clause in] the informal Settlement Agreement." Here for the first time General Counsel intimates the equation of two propositions: (i) that Petitioners had been guilty of noncompliance with the Settlement Agreement and (ii) General Counsel's view that only thirteen challenges were to be withdrawn under the disputed clause as "reasonably" interpreted by the two Counsel for the General Counsel.

15. *July 26:* Mr. Schmidt received from the NLRB a telegram (42a) denying "Respondent's request for special permission to appeal Administrative Law Judge's ruling vacating the Settlement Agreement and reopening the hearing." This message had been telephoned to Mr. Schmidt's secretary at 10:30 a.m. on July 24; the very day of the resumed trail, which Petitioners did not attend because they did not wish to waive their contention that the Settlement Agreement is valid.

16. *August 27:* Petitioners filed with the ALJ and sent to all parties their brief alleging substantially all of the facts and arguments in this Petition.

17. *September 28:* Decision of the ALJ on the trial (4a-38a). It does not mention the Settlement Agreement.

18. *October 28:* Petitioners' Exceptions to the ALJ's decision were filed (42a-43a).

19. *February 29:* Decision of Respondent (39a-53a) affirming, *inter alia,* the ALJ's rescission of the Settlement Agreement. In 247 NLRB No. 191, Respondent had earlier adopted the ALJ's decision (43a). On this date, Respondent passed over Petitioner's constitutional

arguments, saying: "We therefore find that Respondent [Petitioners] has not raised any issue which is properly litigable in this unfair labor practice proceeding" (43a-44a). It should be noted, in refutation, that the Settlement Agreement covered *all* of the cases* shown in its title (58a-59a; 67a-68a).

Reasons Relied on for the Allowance of the Writ.

I. (a) Petitioners were denied procedural due process under the Fifth Amendment of the United States Constitution because without hearing, or proper notice thereof, their Settlement Agreement signed by all parties on April 17, 1979, was cancelled without statutory authorization.

The ALJ's rescission (88a-89a) of the Settlement Agreement was allegedly based on [unsworn] allegations (67a-70a) made by the two counsel for the General Counsel in their Motion to Reopen and Resume hearing (67a-71a) and in their unsworn colloquy (made two months and two days after the signing of the Settlement

*In August 1979, Petitioners had duly caused service on Respondent, among others, of an Amended Complaint (Civil No. 79—1369) filed in the U.S. District for the District of New Jersey. It alleged, *inter alia*, all of the facts herein stated and the same violations of due process under the Fifth Amendment. General Counsel successfully caused dismissal of that Amended Complaint on the contention of "no jurisdiction." The District Court's Order of dismissal (February 5, 1980) made it clear that this dismissal "for lack of subject matter jurisdiction" implied "no opinion on the merits of the Complaint or on defendants' actions or conduct" in the cases settled by the Settlement Agreement. An appeal (Docket No. 80-1392) to the Third Circuit, the brief Judgment Order without opinion read:

> "ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed."

It seemed appropriate to include the comments in item 19, *supra*, and in this footnote because of Respondent's attempt in its decision (43a-44a) to disregard as nugatory or as unworthy of consideration Petitioners' repeated constitutional contentions.

Agreement) to the effect that they and the Union Attorney had signed the Settlement Agreement with un unexpressed "understanding" that the disputed clause was intended to mean *some* but not *all* challenges; and that therefore there had been no "meeting of minds" on the settlement. Neither the ALJ nor Respondent have the powers of a court of equity to rescind the contract, even if, *arguendo*, there had been statutory authorization, notice of hearing and fair hearing. See items 6 *supra* (5) and 10 *supra* (6-7).

(b) At no time were Petitioners given meaningful access to any court as guaranteed by the First Amendment of the United States Constitution.

There was no fair hearing on the rescission and Petitioners could not participate in the resumed trial (42a) without thereby waiving their contention that the Settlement Agreement (59a-64a) is a valid, integrated contract. At no time were they able to make a record of the facts and circumstances relevant to the rescission; since there was no fair hearing prior to the cancellation of the Settlement Agreement [item 10 *supra* (6-7)]; and those facts and circumstances were not considered, and are not set forth, in any decision below. They were simply disregarded in utter neglect of the law of equity on the subject of rescission. See *infra* (15-16).

The absence of authority in Respondent to rescind is clear from the Act, which does not even mention settlement agreements and which confers no power to rescind any type of contract. In any event, recission would have to be based on a proper record to be submitted on review to a United States Court of Appeals. Respondent prevented the making of such a record.

II. As of the signing of the Settlement Agreement and as of July 3, 1979 (when the ALJ decided that there had been no subjective "meeting of minds"), Petitioners had a genuine "property" interest in the Settlement Agreement which could not, consistently with due process, be nullified or confiscated by Respondent.

Petitioners' "property" interest in the signed Settlement Agreement, as one of its signatories induced by counsel for the General Counsel and by the ALJ to sign it as written and as meaning what it says, is supported by the rationale of such cases as *Perry v. Sinderman* 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed. 2d 570 (1972) and *A.R. Jago et al. v. Van Curen,* (not yet reported) decided by this Court on November 9, 1981 in this Court's No. 80-1942. Petitioners' interest could not, consistently with due process under the Fifth Amendment be confiscated or nullified by Respondent without statutory authorization, without fair hearing and notice of hearing and without probing the issues and circumstances involved in contract rescission. No other or better criteria than those given by the law of contracts are available to guide the discretion of Respondent or of litigants. Otherwise, the NLRB becomes a law unto itself.

The *Sindermann* case showed the importance of the "surrounding circumstances" with respect to a "property" interest in re-employment, saying at 408 U.S. 601-602:

> For example, the law of contracts in most, if not all, jurisdictions long has employed a process by which agreements, though not formalized in writting, may be "implied." 3 *Corbin on Contracts,* §§ 561-572A (1960). Explicit contractual provisions may be supplemented by other agreements implied from "the promisor's words and conduct in the light of the surrounding circumstances." Id., at

> §562. And, "[t]he meaning of [the promisor's] words and acts is found by relating them to the usage of the past." *Ibid.* * * *

* * *

The principles of contract law, as shown below, indicate that the circumstances are equally important to contract rescission. *Sindermann* was concerned with the absence of an explicit contractual provision whereas in the case under review, the disputed clause in the Settlement Agreement is explicit. On November 9, 1981, this Court reaffirmed in the *VanCuren* case, the rationale of "property" interests as follows:

> Our decision in *Sindermann* was concerned only with the Fourteenth Amendment's protection of "property" interests and its language, relied upon by the Court of Appeals, was expressly so limited:
>
> > "We have made clear in *Board of Regents v. Roth,* 408 U.S. 564, 571-572 (1972), that 'property' interests subject to procedural due process protections are not limited by a few rigid, technical forms. Rather, 'property' denotes a broad range of interests that are secured by 'existing rules or understandings.' Id., at 577. A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement *to* the benefit and that he may invoke at a hearing." 408 U.S., at 601.
>
> To illustrate the way in which "mutually explicit understandings" operate to create "property" interests relied in *Sindermann* upon two analogous doctrines. First, we compared such understandings to implied contracts:

> "[The] absence of . . . an explicit contractural provisions may not always foreclose the possibility that a teacher has a 'property' interest in re-employment . . . [T]he law of contracts in most, if not all, jurisdictions long has employed a process by which agreements, though not formalized in writing, may be 'implied.' " Id., at 601-602.

That the implied contract aspect of *Sindermann* "understandings" has been limited to the creation of property interests is illustrated by *Bishop v. Wood*, 426 U.S. 341 (1976), another property interest case in which we relied upon the "understandings" language of *Sindermann* to conclude that "[a] property interest in employment can, of course, be created by ordinance, or by implied contract." Id., at 344 (footnote omitted).

Principles of contract law naturally serve as useful guides in determining whether or not a constitutionally protected property interest exists. Such principles do not, however, so readily lend themselves to determining the existence of constitutionally protected liberty interests in the setting of prisoner parole. * * *

III. In violation of due process Respondent usurped the power to rescind the Settlement Agreement and it made matters worse, for due process purposes, by arbitrarily rejecting the guidance provided by the law of contracts insofar as that law deals with rescissions and by improvising its own uncodified rule *ad hoc*.

In the absence of any statute giving Respondent the power to cancel contracts, the law of contracts should at the very least have guided and limited Respondent's

discretion. By denying Petitioners' appeal Respondent not only denied Petitioners their day in court but, abused its discretion and made court review meaningless; since the Respondent's action prevented the making of a proper record for Petitioners' constitutional and related contract law contentions. The impairment of Petitioner's contract rights was, in the circumstances, so grave as to assume the proportions of violation of due process. An uncodified, *ad hoc* NLRB ruling violative of due process, is implicit in Respondent's conduct.

The relevant law of contract is concisely quoted and cited from Williston and Corbin:

Vol. 4 of *Williston on Contracts,* §94, at p. 294:

> It follows that the test of a true interpretation of an offer or acceptance is not what the party making it thought it meant or intended it to mean, but what a reasonable person in the position of the parties should have thought it meant.
>
> * * * where there has been an integration of an agreement, those who executed it will not be allowed to place their own interpretation on what it means or was intended to mean. The test in such a case is objective and not subjective. * * *

Williston sums up at p. 372 Vol. 4, §606:

> * * * Where, however, they incorporate their agreement into a writing, they have attempted more than to assent by means of symbols to certain things, they have assented to the writing as the adequate expression of the things to which they agree. Therefore, a contract may be created though each party attached a different meaning to the language

> used, if he had no reasons to suppose that his own meaning was not shared by the other party.

Corbin on Contracts, Vol. 3, §538, Chapter 24, pp. 372-373 agrees with Williston:

> The court will not interpret the words of an agreement so as to hold one party bound in accordance with the wholly unexpressed intentions and meanings and understandings of the other. A contractor is bound in accordance with the meaning that he induces another to understand and act upon, if he knows or has reason to know that the other will so understand and act. And in determining whether or not he has reason to know, the court should be advised of all the surrounding circumstances; of the meaning that is given to the language of the agreement by common usage, by usage in the trade or business or profession of the parties, of communications between the parties during preliminary negotiations and during the execution of the writing; and of subsequent interpretations and practical application by either party that is assented to or acted upon by the other.

To the same effect are:

Corbin, Vol. 3, §538 pp. 57, 59-63, 73-76, 83; Vol. 3, §606 pp. 365-366, 369-375; Vol. 3, §607 pp. 378-380;

Williston, Vol. 4, §610 pp. 500, 503, 508, 510, 512-513;

Restatement, Law of Contracts §§ 20, 70, 228, 230.

IV. By affirming Respondent's decision, the court below denied both due process and access to the courts on the questions of fact and law raised by rescission of the Settlement Agreement.

This was in no way justified or remedied by the Third Circuit's statement to the effect that Respondent's "finding" of "no meeting of minds" is supported by the Record as a whole. The Record clearly showed that the Settlement Agreement had been cancelled without notice of hearing and without opportunity for trial or adequate hearing of the issues and circumstances relevant to rescission. See, *supra,* item 10 (6-7), item 12 (8) and items 13-18 (8-9). The "finding" was not a finding of fact at all, it was an unwarranted conclusion of law supported by nothing in the Record.

Meaningful access to the courts on the issues raised by rescission of the Settlement Agreement (59a-64a), presupposes fair hearing and notice thereof as ingredient of a suitable record showing in detail the extent of deviation from due process and from the law of rescission. The "finding" in the Judgment Order below (1a-3a) involved only one term, not "terms" (plural), as stated in the Judgment Order; and it contradicted not only the language of the Settlement Agreement (formulated by Respondent and its attorneys without any participation by Petitioners or their counsel) but by the *relevant circumstances:*

(i) The words and syntactical context of the Settlement Agreement (61a); and the formalities of signing [*NLRB v. All Brand Printing Corporation,* 594 F.2d 854 (2CA, 1979)].

(ii) The fact that, prior to the election and thereafter, Counsel for Petitioners had filed documents [item 1 *supra*

(3)] vigorously disputing the Regional Director's disposition of the challenges (5a, 41a-42a). Against that background, language of the disputed clause was a natural concession made to Petitioner to induce settlement.

(iii) The admissions made, after the signing of the Settlement Agreement by its own scrivenors; *i.e.*, the two Counsel for the General Counsel in their motion papers (67a-71a) wherein they complain that Petitioners had failed to comply with, and had neglected, their "obligations" under the Settlement Agreement (67a, 70a).

(iv) In the said motion papers they wrote, thirteen days after the Settlement Agreement was signed, "The Settlement provided, *inter alia,* for the withdrawal of the parties' respective challenges in Case No. 22-RM-533."

(v) They waited two months and two days after that signing to announce, for the first time and by unsworn statement, that they had an uncommunicated "understanding" in conflict with the disputed clause (78a, 82a-85a).

(vi) The Regional Director's letter of April 23, 1979, said nothing of an undisclosed intention, interpretation or understanding respecting the disputed clause. Item 3 *supra* (4).

(vii) Neither did Ms. Balzano when she adjourned the meeting "indefinitely." Item 5 *supra* (5).

(viii) The nature of the Settlement Agreement as a case settlement imperated from competent counsel language carefully and meticulously chosen.*

V. The Court below has decided in this case important questions of federal law which have not been, but should be, settled by this Court.

NLRB settlements constitute an area of the law which is relatively uncharted by authoritative precedents. *NLRB v. All Brand Printing Corporation,* 594 F.2d (1979), at p. 926. Nevertheless approximately 24% of Respondent's enormous load of unfair practice cases is disposed of by settlement, as NLRB's annual reports show. That fact

*The list of relevant circumstances can be extended. *E.g.:*

(ix) The opposition affidavits filed in May, 1979, by Petitioners' Counsel in answer to the General Counsel's motion should have prompted alert Counsel for the General Counsel to assert then that there had been no "meeting of minds." No such assertion was made.

(x) There was no intimation in the ALJ's Order of May 11 (72a-73a) that he or any party had an "understanding" on April 17, 1978 at variance with the disputed clause.

(xi) The dishonesty of the abandoned, unsupported claim that Petitioners had not complied with the Settlement Agreement.

(xii) No one answered Mr. Schmidt's letter of June 25. Item 11 *supra* (7-8).

(xiii) Even as late as July 17, 1979 Counsel for the General Counsel spoke of "Respondent's [Petitioners'] refusal to comply "with the Settlement Agreement" Item 14, *supra* (8-9).

(xiv) Williston indicates an additional circumstances (Vol. 4, §621):

> "Since one who speaks or writes, can by exactness of expression more easily prevent mistakes in meaning, than one with whom he is dealing, doubts arising from ambiguity and of language are resolved in favor of the latter * * *" [pp. 760-761].

bespeaks the importance of the issues here raised. The precedent set by the decisions below approved usurpation of authority to rescind by Respondent. The Act gives no such authority. This Court has not tolerated lesser and more plausible self-arrogation of power in *American Ship Building Company v. NLRB,* 380 U.S. 300, 85 S.Ct. 955, 13 L.Ed2d 855 (1965). Since there is no statute, no authoritative case law and no NLRB regulation on settlements to which litigants in the position of Petitioners can turn for guidance, Respondent's unfettered discretion became the unregulated regulator. The precedent set by the decisions below make it easy to unsettle almost any settlement agreement. All it takes is an unsworn allegation by one party or his attorney to serve as foundation for Respondent's belief that rescission is appropriate; even when the allegation is made months after the alleged "understanding" different from the words in the settlement agreement. No settlement is safe; even where expressed in writing or in an integrated contract. The "understanding" of counsel for the General Counsel, not communicated until months after signing of the Settlement Agreement and then communicated by unsworn statement in a colloquy with the ALJ were sufficient in the eyes of Respondent to justify rescission without statutory authorization, without fair or adequate hearing, without notice of such hearing, without sworn testimony and without the guidance provided by the courts who, with great expertise developed, case by case, a body of contract-law principles on the formation, interpretation, rescission and reformation of contracts.

VI. The Court below has decided a federal question in a way in conflict with applicable decisions of this Court.

Procedural due process imposes constraints on governmental decisions which deprive individuals of "property" interests within the meaning of the due process clauses of

the Fifth and Fourteenth Amendments (12-14). Even the interest of an individual in the continued receipt of social-security disability benefits is protected by the Fifth Amendment. *Mathews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed2d 18 (1976), and cases there cited. This Court has consistently held that some form of adequate hearing is required before any individual is finally deprived of a "property" interest. *Wolff v. McDonnell,* 418 U.S. 539, 557-558, 94 S.Ct. 2963, 41 L.Ed2d 935, *Mathews v. Eldridge, supra.* The right to be heard before being condemned to suffer grievous loss of any kind is a principle basic to our society. *Joint Anti-Fasait Committee v. McGrath,* 341 U.S. 123, 168, 71 S. Ct. 624, 95 L.Ed. 817. Respondent repudiated a fundamental requirement of due process, namely, the opportunity to be heard "at a meaningful time and in a meaningful manner." Petitioners should have been given a proper hearing and proper notice thereof before the ALJ presumed to cancel the Settlement Agreement. *Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed2d 62 (1965).

Long ago this Court ruled that people who are brought into contest with the Government in a quasi-judicial proceeding aimed at control or criticism of their activities are entitled to be fairly advised *beforehand* of what the Government proposes as the issue and to be heard on the proposal *before* final ruling is issued. *Morgan v. United States,* 304 U.S. 1, 18-19, 5889 S.Ct. 773, 82 L.Ed 1129 (1938).

These principles, protected by a Court ever alert to prevent tyranny and confiscation of property and freedom, are importantly at stake in this case. They were violated by the decisions below. When Petitioners and their attorney read the notice of hearing for June 19, 1979 (74a-75a) they had no reason to suppose any contract cancellation was in

the offing; since the ALJ's Order of May 29, 1979 was obviously a correction of the erroneous and precipitate Order of May 11 (72a-73a). Likewise when Petitioners heard the ALJ ask the questions which appear in item 10 *supra* (4), they had no reason to suppose that rescission of the Settlement Agreement was contemplated by the ALJ; whose concentration on June 19, 1979, was on contract interpretation.

CONCLUSION.

For these reasons, a writ of certiorari should issue to review the Judgment Order of the Third Circuit.

Respectfully submitted,

GODFREY P. SCHMIDT
Attorney for Petitioners
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Biquette, Inc.
660 Madison Avenue
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(212) 750-1300

APPENDIX A—Judgment and Order of the United States Court of Appeals for the Third Circuit Made and Entered September 21, 1981.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

Nos. 80-1741 and 81-1577

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

JACQUES SYL KNITWEAR, Inc., BIQUETTE, Inc.,

Respondent.

LOCAL 162, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO,

Intervenor in No. 80-1741.

(Board Nos. 22-Ca-8558, 22-CA-8655, 22-CA-8698, 22-CA-8713, 22-CA-8897 and 22-RM-553)

ON APPLICATION FOR ENFORCEMENT OF AN ORDERS OF THE NATIONAL LABOR RELATIONS BOARD

Argued: September 14, 1981

Before:

GIBBONS and HUNTER, *Circuit Judges* and GERRY, *District Judge**

GODFREY P. SCHMIDT, Esq. (Argued)
660 Madison Avenue
New York, New York 10021
Attorney for Respondent
WILLIAM WACHTER, Esq.
JAMES Y. CALLEAR, Esq.
LYNNE DEITCH, Esq. (Argued)

William A. Lubbers, General Counsel
John E. Higgins, Jr., Deputy General Counsel
Robert E. Allen, Acting Associate General Counsel
Elliott Moore, Deputy Associate General Counsel

National Labor Relations Board
Attorneys for Petitioner

Judgment Order

The National Labor Relations Board petitions for enforcement of its orders directing Jacques Syl Knitwear, Inc. and Biquette, Inc. to bargain collectively with Local 162, International Ladies' Garment Workers' Union. Respondents contend that the Board erred in certifying the Union as a bargaining representative because the Administrative Law Judge hearing challenges to ballots in a Board certified election disregarded a settlement agreement. The finding that there was no meeting of the minds

*Hon. John F. Gerry, United States District Judge for the District of New Jersey, sitting by designation.

on the terms of the settlement is supported by substantial evidence in the record as a whole.

It is ORDERED that the Board's orders of February 9, 1980 and March 5, 1981 be and are hereby enforced in all respects. Costs are taxed in favor of petitioner, National Labor Relations Board.

BY THE COURT,
JOHN J. GIBBONS
Circuit Judge

Attest:
SALLY MRVOS,
Clerk

Dated: Sep 21 1981

APPENDIX B—Decision of Administrative Law Judge Ralph Winkler.

JD-693-79
Newark, NJ

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

JACQUES SYL KNITWEAR, Inc., BIQUETTE, Inc.,

and

LOCAL 162, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO

Cases 22-CA-8558, 22-CA-8655, 22-CA-8698, 22-CA-8713, 22-CA-8897, 22-RM-553

Maria E. Balzano, Esq., and *Celeste J. Mattina, Esq.*, for the General Counsel.

Melvin L. Gelade, Esq. (Kapelsohn, Lerner, Reitman & Maisel), Newark, NJ, for the Union.

Godfrey P. Schmidt, Esq., New York, NY, for Respondent.

DECISION

Statement of the Case

RALPH WINKLER, Administrative Law Judge: This is a consolidated complaint and representation case. The

charging party in the unfair labor practices phase of this proceeding is Local 162, International Ladies' Garment Workers' Union, AFL-CIO ("Union"); the petitioner in the representation case is Jacques Syl Knitwear, Inc., and Biquette, Inc., (jointly, "Respondent"). The General Counsel issued the original complaint against Respondent on August 11, 1978, and he ultimately issued a third amended complaint on February 6, 1979. Respondent filed answers to these complaints denying, *inter alia,* that it had violated the Act in the respects alleged.

In its respresentation petition filed on June 28, 1978, Respondent asserted an appropriate unit of "all production and maintenance employees including shipping and receiving employees" of Jacques Syl and Biquette with the usual exclusions ("office-clerical" etc.), and the petition further stated that the Union had claimed representation for these employees. By direction of the Regional Director, an election was conducted in the aforedescribed bargaining unit[1] on August 21, 1978. The eligibility date used in the election was the payroll period ending July 8, 1978. The election results showed that 21 votes were cast for the Union, 24 votes were cast against the Union, and 36 ballots were challenged. Respondent and the Union each filed objections to conduct affecting the results of the election. In a Supplemental Decision issued on November 29, 1978, the Regional Director overruled Respondent's objections; he also found that Objections Nos. 1, 3, 4 and 6 filed by the Union (the Union had withdrawn other objections) were among the unfair labor practices allegations of the second amended complaint against respondent and should therefore await determination of those allegations. The Regional Director's Supplemental Decision also sustained challenges to some ballots and overruled challenges to others, and he also found that five challenges required a

[1] I find that such unit is an appropriate bargaining unit within Section 9(b) of the Act.

hearing on factual issues and that the determination of eight other challenged ballots must await resolution of unfair labor practices allegations in the outstanding complaint. The Regional Director advised the parties in his Supplemental Decision that his rulings on objections and challenges in the Supplemental Decision are "final" under Section 102.78 of the Board's Rules and Regulations unless the Board grants special permission to appeal therefrom. Neither Respondent nor the Union sought such appeal.

On December 15, 1978, the Regional Director issued an order consolidating the representation case with the outstanding unfair labor practices cases "for the purpose of hearing, ruling and decision by an Administrative Law Judge, as to the status of the remaining 13 unresolved challenged ballots . . . and the Union's Objections Nos. 1, 3, 4 and 6 . . . as well as issues raised . . . in the . . . unfair labor practice cases."

Hearing in this consolidated matter began on March 26, 1979, and closed on July 24, 1979. Upon the entire record, including observation of the demeanor of witnesses and consideration of briefs, I make the following:

Findings of Fact

I. The Respondent

Jacques Syl and Biquette are New Jersey corporations engaged in business at the same address in West New York, New Jersey. Jacques Syl manufactures children's garments. Each is an employer engaged in commerce within Section 2(6) and (7) of the Act.

Jacques Syl and Biquette are affiliated business enterprises with common officers, directors, and stockholders. Jacques Syl performs the manufacturing phase of the enterprise, Biquette the shipping functions. Cirla Fridman

is president and owner of both companies, Francine Gruber is vice president, and Suzanne Srour is secretary-treasurer. These individuals operate both companies as a single, integrated enterprise with a common labor relations policy. As indicated above, both companies together are referred to as the Respondent.

II. The Labor Organization

The Union is a labor organization within Section 2(5) of the Act.

III. Procedural Issues

It is appropriate before addressing the merits of this case, to discuss Respondent's contention that it was denied due process because the hearing commenced in the absence of its counsel, Mr. Schmidt.

With the issuance of the third amended complaint in these consolidated proceedings the Regional Director fixed March 5, 1979, as the date of the hearing. On or about February 20, 1979, Mr. Schmidt requested the Regional Director that the hearing be postponed until April 1979; he stated as reason therefor that he was counsel for plaintiffs in an action before the United States District Court for the District of New Jersey (*Cichorz et al. v. Local 164, I.B.E.W.*, Civil No. 74-1381), that Judge Lawrence A. Whipple had peremptorily set that trial for March 5, 1979, and that he (Schmidt) believed that the Cichorz trial would last at least 2 weeks. By order dated March 1, 1979, the Regional Director postponed the hearing until 11 a.m. on March 26, 1979.

In attendance at the scheduled hearing place on March 26 were the General Counsel's trial attorneys (Ms. Balzano and Ms. Mattina), counsel for the charging party (Mr. Gelade), the court reporter, a court interpreter, and four prospective witnesses, two of whom Ms. Balzano said

could return another day but the other two were present at great inconvenience and might not be able to return. Neither Mr. Schmidt nor his client was present, and they had not appeared when I opened the hearing at 11:08 a.m. Ms. Balzano then advised me that Mr. Schmidt had called her a week or so earlier and had requested a further postponement purportedly because he was "tied up" with the Cichorz trial. Balzano, who has no authority to grant postponements, advised Schmidt that she didn't believe the Regional Director would grant Respondent another postponement for the *Cichorz* matter but suggested that Schmidt submit a written request to the Regional Director, and Schmidt said he would do so. (The Board's Rules and regulations, Section 102.16 and 102.24, require such motions to be "in writing.")

Ms. Balzano meanwhile learned that the *Cichorz* trial before Judge Whipple had been recessed on March 22 through the entire week of March 26. By Friday, March 23, the Regional Office had not received a written request from Mr. Schmidt for postponement and on that day Ms. Balzano called Schmidt to discuss trial matters relating to the present hearing which was scheduled to commence on March 26. Schmidt told Balzano that he was "tied up in Judge Whipple's court" and would not appear at the Labor Board hearing on March 26 and had advised his client not to appear and that he had submitted a written request to the Regional Director for a postponement. Balzano then told Schmidt that she understood the *Cichorz* case to be in adjournment, to which Schmidt replied that it was but that he had much preparation to do in connection with that recessed trial. Balzano informed Schmidt that the Regional Director had not received a written request for a postponement which Schmidt had told Balzano he had sent, and Schmidt then said he would send a telegraphic request to such effect that same day (Friday, March 23). Balzano told Schmidt that she didn't believe the Regional Director would grant a postponement

at that late date, and she suggested that Schmidt request the Administrative Law Judge for a postponement at the opening of this hearing on Monday, March 26. Schmidt repeated that he would not appear at the hearing. Balzano again suggested that Schmidt make his request to the Administrative Law Judge on March 26, whereupon Schmidt remarked that he was involved in another "case" in Puerto Rico, but without indicating the name or nature of the case or even that a trial was scheduled in such purported case.

Returning now to events on the morning of Monday, March 26: upon opening the record in this matter and being advised of the above-described matters by Ms. Balzano, I requested Ms. Balzano to inquire from Judge Whipple's office concerning the status of the *Cichorz* trial. Balzano reported back after such call that that trial was in recess until April 2. This same morning (March 26) before the hearing began, the Regional Director received the following wire sent by Schmidt on March 23:

> THIS WILL CONFIRM MY PREVIOUS TELEPHONED NOTICE TO MS. BALZANO AND MY WRITTEN NOTICE TO YOU DATED MARCH 13 1979 THAT I CANNOT APPEAR FOR THE TRIAL OF THE COMPLAINT AGAINST MY CLIENTS JACQUES SYL KNITWEAR INC. AND BIQUETTE INC. I AM ON TRIAL BEFORE JUDGE WHIPPLE IN A LENGTHY CASE REQUIRING MANY INTERRUPTIONS AND MUCH RESEARCH FOR TRIAL PURPOSES. JUDGE WHIPPLE WILL CONFIRM THIS. I CANNOT GIVE MY ATTENTION TO ANOTHER TRIAL WHILE THAT CASE IS PENDING.

That same morning (Monday, March 26) in an envelope postmarked March 23, the Regional Director also received

a copy of a letter from Schmidt bearing the date "March 13, 1979." Attached was a note from Schmidt to Balzano stating that "Here is a copy of the letter sent by me on March 13, 1979 which you say you didn't receive." The "March 13" letter read as follows:

> I shall be unable to try the above case on behalf of the Employer on March 26, 1979, because of my involvement in the case of *Circhorz et al. vs. Local 164 EBEW* (74 Civ. 1381) now on trial before Judge Lawrence A. Whipple.
>
> That trial, because of the interruptions caused by the Federal Act expediting criminal cases, cannot be tried continuously. In any event it will continue a number of weeks beyond March 26, 1979. Since that case requires much research even during the aforestated necessary interruptions, I cannot give proper attention to any other trial while the *Cichorz* case is pending before Judge Whipple.

Counsel for the General Counsel called these communications to my attention and introduced them in the record.

I requested Ms. Balzano to call Mr. Schmidt's office to inquire whether he intended to appear. Balzano reported back that she called Schmidt's office and spoke with someone who identified herself as "Evelyn Genovese" and who appeared to Balzano to be Schmidt's secretary. Genovese told Balzano that Schmidt was in Puerto Rico "on a case involving the San Juan Hotel" and she also told Ms. Balzono that "she had copies of letters to show that they had requested postponement two weeks ago" and "had given us [the Regional Office] plenty of opportunities." At my request, Ms. Balzano called Genovese again to inquire whether Schmidt would appear at the present hearing the next day. Balzano made the call and reported that Genovese this time said that Schmidt represents several hotels in Puerto Rico, that Schmidt was in conference in

Puerto Rico that day (March 26) over a trial involving a hotel, that she (Genovese) did not know the name of the case or in what court or before which judge the trial was scheduled to be heard, that the trial would begin on or about March 28, and that Schmidt would not be returning to the New York area until Monday, April 2. (This was when the *Cichorz* trial before Judge Whipple was to resume.)

I then called Respondent's office and spoke with Mrs. Gruber, Respondent's vice president, following which I stated on the record:

> Let the records show that I spoke with a Mrs. Gruber, an officer of the respondent in this case. I explained the situation to her; that the trial was set for this morning; that neither she nor respondent's attorney was present. That everyone else was convened here, all the attorneys, the witnesses, interpreter and I as well.
>
> She told me that she had spoken to Mr. Schmidt on either Thursday or Friday of last week and that he told her that there would be no trial this morning.
>
> I told Mrs. Gruber, in return, that to my knowledge [neither] the regional office nor the judge's division had granted any postponement beyond this morning and that it seems as if she has been misinformed as to the fact that there was a postponement.
>
> I told her I felt very sorry about her situation, however, there are two witnesses here today who were here at great inconvenience to themselves and that government had to operate and that these cases are as important as any other cases.
>
> I further told her I would take these two witnesses today and that we would meet tomorrow morning at 9:30 and proceed with this case. And

that I hoped either she and an attorney would come to be present. However, that I did intend to proceed with this case.

And other things were said, but I guess nothing of any materiality as far as the pending procedural issues in this case. I think I have advised the record and the parties where we stand in this matter.

It was now 12:30 p.m. We recessed for lunch and shortly after 1:30 p.m. the first of the two mentioned witnesses was called to testify.

The hearing resumed the next morning (March 27, 1979) at 9:30 a.m. Mrs. Gruber appeared with an attorney, Miguel Munoz. Mr. Munoz stated that he was not a labor lawyer and not familiar with the case and that he was appearing at Respondent's request for the sole purpose of requesting a continuance of the hearing until Mr. Schmidt would appear. Mr. Munoz offered no explanation for Mr. Schmidt's absence. I denied the motion and proceeded with the hearing through March 29, 1979. Mrs. Gruber sat at counsel table with Mr. Munoz but the latter did not further participate in the hearing. Mrs. Gruber cross-examined some witnesses, and on March 28, 1979, she made a motion for separation of witnesses, pursuant to Schmidt's telephonic suggestion to her from Puerto Rico the previous night. The motion was granted.

The General Counsel attorneys had practically completed their case by March 29, 1979. However, I advised the General Counsel that I would not close the record at that time. Mindful of the April 2 resumption date of Schmidt's *Cichorz* trial before Judge Whipple, I recessed the hearing until April 16, 1979, so that Mr. Schmidt would have an opportunity to present Respondent's case. Schmidt and his client appeared on April 16 and 17, 1979; he made no statement about his absence the week of March 26 or about the hearing having commenced in his absence. April 16 and 17 were taken up with discussions in

an effort to resolve the case amicably, and the parties finally did execute and I approved an all-parties Settlement Agreement purportedly disposing of all outstanding representation and unfair labor practice issues. For reasons and in circumstances explained in Appendix A attached hereto, the Settlement Agreement was set aside on July 3, 1979, and that same day I directed that the hearing be reopened and resumed on July 24, 1979. Respondent filed an appeal with the Board on July 11, 1979, requesting in effect that the Board reverse my order (Appendix A) vacating the Settlement Agreement. The Board denied such appeal by telegraphic order on July 23, 1979.

Respondent, meanwhile, had not requested a stay of my reopening and resumption order pending its appeal. The hearing accordingly reconvened at 11 a.m. on July 24, 1979. Ms. Balzano and Ms. Mattina were present for the General Counsel, Mr. Gelade for the Union was present with a witness, the reporter was present, and I was there. Mr. Schmidt and his client did not appear, and I requested that Ms. Balzano attempt to contact them by telephone. Balzano subsequently reported that she twice dialed Schmidt's office, letting the phone ring about 20 times, without anyone answering the phone on either occasion. She then called Respondent and spoke to Mrs. Srour, Respondent's secretary-treasurer. Mrs. Srour said that Respondent hadn't received an answer to its mentioned appeal, to which Balzano replied that no stay of the hearing had been granted. (Respondent, to repeat, had *not* requested that I postpone the resumption pending its appeal.) Srour said that Balzano "had better" call Schmidt, because "I don't think we're going to be there." And they were not there. One hour after the scheduled time, the hearing finally proceeded without Mr. Schmidt and his client, and the General Counsel and the charging party concluded their submissions and rested that day (July 24). Before the record was closed, counsel for the

General Counsel stated that she desired to reverse and exhibit number for a document which was not then at hand but which would be supplied later on. By letter dated August 2, 1979, with copies to all parties and their counsel, the General Counsel enclosed the following letter dated July 23, 1979, from E. C. Kurtz, Supervisor Ticket Control and Custodian of records, Eastern Air Lines:

> We have checked our reservation records for the period March 23, to March 30, 1979 and the enclosed copies of ticket 007-8334-759870 represents the only record we have of a G. Schmidt from New York to San Juan and return.
>
> Flight coupon 1 was used on flight 929, scheduled to depart New York at 10:15 P.M. on March 26, 1979.
>
> Flight coupon 2 was used on flight 922, scheduled to depart San Juan at 2:30 P.M. on March 30, 1979.

General Counsel's letter of August 2, 1979, and the Kurtz letter with enclosures are received in evidence as General Counsel Exhibit No. 36.

Respondent's contentions

Respondent contends that it was a violation of procedural due process "for the ALJ to permit commencement of the trial herein in the absence of Counsel for Respondent; because (a) the latter should not have been required, in the middle of a civil action (The *Cichorz* case) in the Federal Court in Newark, to prepare and try the instant case; (b) Counsel for the General Counsel and the Regional Director arbitrarily refused Mr. Schmidt's request that these cases be adjourned to a date after the completion of the *Cichorz* case; and (c) Counsel for the General Counsel knew that Mr. Schmidt had to appear

before a Federal Court in Puerto Rico during the week's pause in the *Cichorz* case."

Respondent contends that it was also a violation of procedural due process "to rush the last day of trial on July 24, 1979, without proper and adequate notice to Respondent's attorney who first saw the telegram [the Board's telegraphic order of July 23, 1979] . . . on July 26, 1979, because (a) Fixing that last day of trial presented Respondents with the Hobson choice of either seeking judicial remedy in the District Court at the prohibitive price of defaulting before the ALJ, or hopelessly seeking an appropriate remedy from an ALJ who had already improperly ruled against Respondents respecting the Settlement Agreement at the price of waiving the civil action instituted in the Federal Court. Such option amounted to denial of access to the Courts and to denial of due process under the Fifth Amendment. *Ex parte Young,* U.S. 123 (1908)."

Discussion

On the very morning of the March 26 hearing Respondent Counsel was asserting in his March 23 wire and "March 13, 1979" letter to the Regional Director that he needed a second postponement because of the exclusive demands of the *Cichorz* matter in New Jersey. Mr. Schmidt nevertheless apparently devoted the week or most of the week of March 26 to an unrelated case in Puerto Rico. And when, on March 27, Mr. Munoz requested a continuance until Mr. Schmidt would appear, Mr. Munoz offered no information concerning the case in Puerto Rico which might provide or even suggest reasonable basis for resolving Schmidt's conflict of engagements in favor of his involvement in the Puerto Rican matter. At no time on March 26 did Mr. Schmidt request the undersigned or the Division of Judges before that date that the hearing be

postponed. And at no time in connection with the scheduled resumption on July 24 did Mr. Schmidt request of the undersigned that the resumption hearing be postponed to await the Board's ruling on Respondent's appeal.

Postponements of proceedings are not a matter of right; rather, they are to be either granted or denied upon consideration of the inconvenience and possible unfairness to other affected parties as against a claimed hardship of the party making the request (*N.L.R.B. v. Hijos de Ricardo Vela, Inc.*, 475 F.2d 58, 61 [C.A. 1, 1973], enf'g 194 NLRB 377 [1971]; *N.L.R.B. v. Air Control Products, Inc.*, 335 F.2d 245, 248 [C.A. 5, 1964]), while keeping in mind that these proceedings must proceed with "the utmost dispatch." *N.L.R.B. v. American Potash & Chemical Corp.*, 98 F.2d 488, 492 (C.A. 9, 1938), cert. denied, 306 U.S. 643; *N.L.R.B. v. Glacier Packing Co., Inc.*, 507 F.2d 415, 416 (C.A. 9, 1974). Unless a postponement or continuance is improperly refused, it is not a denial of due process for the Board to conduct its hearing without the presence of a respondent or his representative. *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 25, 47 (1937); *N.L.R.B. v. American Potash & Chemical Corp., supra; N.L.R.B. v. Glacier Packing Co., Inc., supra; Spiegel Trucking Company*, 225 NLRB 178, 179 (1976), aff'd 559 F.2d 188 (C.A. D.C., 1977).

The reason the hearing in this case commenced on March 26 without Mr. Schmidt's presence and reconvened without him on July 24 is that he chose not to appear on either occasion. Not on March 26 or March 27 or July 24 or at any other time in this hearing was Respondent arbitrarily denied, in my opinion, a timely and otherwise proper request for a postponement or continuance of hearing. I accordingly reject Respondent's due process contentions.

IV. Unfair Labor Practices

The complaint

The complaint alleges that Respondent engaged in specified violations of Section 8(a) (1) of the Act and that it also violated Section 8(a) (3) and (1) of the Act by discharging five employees, by denying vacation pay to striking employees, and by threatening its striking employees with permanent replacement if they did not cease their strike and return to work and then permanently replacing and refusing to reinstate these striking employees whom the complaint alleges to have engaged in an unfair labor practices strike. Alleging that the Union represented a majority of employees in the described appropriate unit, the General Counsel also contends that Respondent's unlawful conduct warrants a *Gissel*[2] bargaining order in addition to other appropriate relief for the violations alleged.

The organizing campaign and Respondent's countermeasures

The Union, through its Director of Organization, Genaro Rivera, and staff organizers, began organizing Respondent's employees in May 1978, in which connection, among other things, it distributed leaflets and union authorization cards. During the following month the organizers engaged in these activities on a daily basis at Respondent's plant and many of the employees signed union authorization cards.

Respondent actively opposed its employees' organizing efforts by a campaign of its own. Credible testimony establishes that the principal actor in this connection was Respondent's president, Mrs. Cirla Fridman. The record thus shows:

[2] *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575 (1969).

Fridman approached Rosa Bonilla at work on or about June 14 and inquired whether Bonilla had signed a union card. Then she told Bonilla that she had been informed that Bonilla and Bonilla's mother (Gloria Vargas), also employed by Respondent, were "collecting signatures to bring the Union . . . into the factory." When Bonilla asked who had told this to Fridman, Fridman replied, "Someone who tells things to me."

Bonilla related the above conversation to Mrs. Vargas. Vargas thereupon asked Fridman who had said that Vargas was soliciting for the Union. Fridman replied, "Gloria, I am glad that you have told me this, because I know that you are one of ours." On another occasion during that period, Fridman approached Vargas and told her that "whoever wants a factory with a union could leave and go to a factory which had the union." According to Vargas' credible testimony, Fridman also frequently stated in the work area "so that everybody would hear it," that "even if it cost her a million dollars, the Union wouldn't come into the factory."

Fridman approached Madeline Collazo at work in mid-June and told the latter, "What does it seem to you, Madeline, what Aleida [Diaz] has done to me?" Fridman continued that she had always treated Diaz well and has given her "overtime" and "raises," and "now she had signed the card for the Union." (Diaz was discharged a few weeks later, as will be discussed.) Fridman added she was "very upset" because she "didn't want any union in the factory."

Fridman approached and told Maria Colon in other employees' presence at work in mid-June that "if anyone tried to have a union in the factory, she would prefer to shut down the plant." On another occasion during that period, Fridman asked Colon whether she had signed a union card. Fridman also remarked on this latter occasion that Aleida Diaz should work elsewhere "if she wanted a factory with a union."

Fridman approached Amanda De Gonzales at work in mid-June and inquired whether the latter had signed a union card. De Gonzales replied that she had not and Fridman then urged De Gonzales not to let anyone convince her to sign a card.

Fridman approached Pia Gallo at work in the presence of other employees on or about June 22. Remarking that she (Fridman) "know[s] everything that's happened in the factory," Fridman inquired, "How did it go for you at the [Union] meeting yesterday? Gallo asked "what meeting" and Fridman replied that it was "the one you were going to attend but was canceled." This was so. Fridman asked whether Gallo thought the Union would pay her the $3 an hour that "they are promising you." Fridman also accused Gallo of bringing bread to her co-workers as a "bribe" to them to sign union cards.

Fridman told Ondina Pineiro in the presence of other employees at work in mid-June that she "did not want a Union, and that before a Union came, she would close the factory."

Fridman several times told an employee in Miriam Reyes' presence at work in mid-June that the Union people were "a group of racketeers" and that if the Union came in she had "enough money to close the factory" and relocate it under another name.

Fridman told Candelaria Fernandez and three other employees at work in mid-June that they should not have "anything to do" with the Union and that she would "shut down" the factory if the Union came in.

The strike

On or about June 22 and 23, 1978, various employees recounted to Rivera, the Union Organization Director, the threats and other conduct of Mrs. Fridman described above. It was further reported to Rivera that these threats had made employees fearful for their jobs and that

employees didn't want to be seen talking to the organizers and that they therefore wanted the organizers "to stop coming around for a while." Rivera assessed the situation with his staff and they decided to call a strike to protest Fridman's threats. Rivera had meanwhile informed some employees of the contemplated strike action.

On Tuesday, June 27, 1978, Union agents appeared at Respondent's premises with picket signs bearing the following legend: "Workers of Jacques Syl Knitwear on Strike for Unfair Labor Practices, Please Don't Cross the Picket line, International Ladies' Garment Workers' Union, AFL-CIO, Local 162." More than 30 employees joined the strike that day and began picketing. That same day at the Union office Rivera advised the employees that they were striking to protest Respondent's unfair labor practices and also to obtain union recognition from Respondent. That same day the Union filed its original unfair labor practices charge against Respondent in this proceeding. The following day Respondent filed its representation petition. The strike lasted until September 15, 1978. Not all the employees participated in the strike and Respondent meanwhile continued to operate.

Respondent's conduct during the strike

Vacation Pay. Respondent traditionally closes down its production operations for one week during the summer and it gives vacation pay for this week to employees having more than one year's employment. (It gives another paid week of vacation in the winter to employees with 5 years' employment.) The summer vacation week in 1978 had been scheduled to begin on Monday, July 3. Respondent's practice has been to give employees their vacation checks on their last workday before their vacation. If, for example, an employee did not work during the week before the vacation week, she received her check on the last day before her vacation that she did work. Striking employees advised Rivera shortly after the strike began

that they wanted their vacation pay. Rivera went to Respondent's premises on June 30, 1978, and told a police officer there that he desired to go into the plant to speak with Mrs. Fridman about the vacation checks. The officer said that Rivera should remain outside and that he (the officer) would inform Mrs. Fridman of Rivera's request. The officer returned shortly and advised Rivera that Fridman had told him that strikers "were not entitled to get vacation pay." Mrs. Fridman later came out of the building and Rivera approached her saying that the employees were entitled to vacation checks. Fridman replied, "Why don't you pay them, they're on strike with you, you pay them." Strikers were present at the time, and Fridman told them, according to Pineiro's credible testimony, that "we didn't have the right to vacation pay, because we had gone out on strike, and to go to the Union to receive vacation pay." The striking employees have not received their summer vacation checks for 1978.

Respondent seeks to induce strikers to return. Mrs. Fridman contacted a number of striking employees by phone on or about July 3, 1978, for the purpose of persuading them to abandon the strike and return to work. One such employee was Migdalia Sanchez. Fridman also called Rosa Bonilla and Lourdes Becerril and told them they would receive a raise in salary if they returned. Fridman told Becerril that "the Union was not going to come in" and that "we [the strikers] were going to lose our jobs and that then we wouldn't have neither the Union nor our jobs." (During the conversation with Becerril, Fridman also said that she was "very hurt" that Maria Colon had gone out on strike instead of asking for a wage increase and that she (Fridman) would have given it to her. Colon is one of the five employees alleged to have been unlawfully discharged.)[3]

[3]Sometime after the strike ended and after Respondent had discharged Colon, Fridman also told Gilda Pereira that Colon had "hurt" Fridman by participating in the strike despite the fact that Fridman had helped Colon "so much" over the many (18) years of Colon's employment.

Fridman called and told Graciela Cepeda that she would send an escort for Cepeda if the latter was afraid to return and that Cepeda should "think it over because I [Cepeda] was an older person, and it wouldn't be easy for me to find a job"; Cepeda replied that she was not afraid but would not return during the strike. Fridman offered double pay to Ondina Pineiro to work on July 4 and said that Pineiro's refusal to work would cost her a job "permanently." In a call to Mary Porta, Fridman asked Porta why she had joined in the strike and Fridman offered to give her double pay to work on July 4; Porta replied that as a union member she would not go against the Union, to which Fridman stated that "the Union will never get in" and that Fridman had "more powerful" people who "would take care of" the Union.

Assaults on union representatives. Respondent hired 13 guards during the strike in June and July. These guards escorted and transported non-striking employees to and from the plant. When delivery trucks approached the plant and stopped at the picket line there, these guards would tell the delivery people to cross the picket line as there was no strike and that they (the guards) would unload merchandise if drivers would not cross the picket line. These guards at times carried golf clubs, bats, and other implements.

On or about July 3, 1978, union organizers Jimmy Montanez, Roberto Gonzales, and Duilio Amaya arrived at Respondent's premises. Some of the guards approached these organizers and asked to speak to their supervisor, Rivera. Rivera shortly drove up to the plant, and while he was looking for a parking space, five of these guards followed him in a car. One of the guards, named Mario, told Rivera that he had an "interest" in the shop and that he wanted Rivera to leave the shop alone. Rivera suggested that they meet another time, and they did on July 5. On this latter occasion Mario told Rivera that he had a recognition agreement and contract with Respondent and

that he wanted "to keep" the shop for a year. Mario did not identify any labor organization he was affiliated with and Rivera told him that he (Rivera) would not abandon the Union's organizational efforts among Respondent's employees.

A union organizers' car bearing picket signs was parked on a public street at Respondent's premises on July 3. Inside the car were union organizers Gonzales, Amaya and Montanez. Four or five guards (one of them wearing a neck chain inscribed with the name "Mario") came running toward the car from inside the plant shouting, "mother fuckers, get the hell out of here, we don't want to see you anymore." These individuals then kicked and pounded the car and broke the antenna of a walkie talkie held by Amaya. This was witnessed by striking employees. Gonzales, who was in the driver's seat, started the car and drove off. While circling the block and returning to the plant, the organizers were followed by guards in another car; the guards' car pulled up in front of the moving union car and blocked it. The guards stepped out of their car; one of them had a blackjack, another threw an object at the union car, and a third one (Mario) opened his jacket and reached for a pistol. To elude the guards, Gonzales backed up the union car and drove against traffic on a one-way street.

Further events during the strike; the Union discontinues the strike

By letters dated June 28, 1978, but which were not mailed until on or about July 13, Respondent notified five striking employees that they were discharged as of June 28 for alleged strike misconduct. These discharges will be discussed later.

In July 1978, Respondent notified each of its striking employees that "If you do not return by August 1st, 1978,

we will begin to replace you permanently by hiring workers from outside . . ." And Respondent did hire some replacements in July and August 1978.

By letter dated September 11, 1978, the Union advised Respondent that it was discontinuing the strike "effective Monday, September 18," and that it was thereby making an "unqualified and unconditional" offer to return to work on that date in behalf of all striking employees. The letter listed the names of 37 employees in whose behalf the offer was made. A substantial number of striking employees accordingly reported at the plant on September 18. Respondent offered reinstatement to five of the employees on that date, to five more in October 1978, and to four in March 1979. So far as the record shows, no other striking employees have been reinstated. Respondent has hired 45 new employees since the strike began on June 27, of whom 30 have been hired since August 1, and 18 of these 30 have been hired since September 18, 1978. The record also shows that during October 1978, Respondent placed newspaper advertisements soliciting applications for employment in unit positions.

The discharges

As indicated above, Respondent discharged five employees for alleged strike misconduct. These employees were Aleida Diaz, Ondina Pineiro, Rosa Martinez, Miriam Reyes, and Maria Colon. Respondent's discharge letters to Martinez, Pineiro, Reyes,[4] and Diaz stated as the reason for their terminations that each had "violently assaulted" fellow employee Dorinda Suarez on June 28, 1978; the letter to Colon stated that Colon was discharged

[4]Reyes also received another letter from Respondent dated June 29, 1978, terminating her as of that date for assaulting two employees, Ismaria Miranda and Olga Miranda. She credibly testified that she had not assaulted or threatened either of the Mirandas or anyone else, and there is no other testimony concerning such alleged assault.

for having threatened fellow employees Guiseppi Ferrulli and Lucretia Ramon with "bodily harm and abusive language" on June 28, 1978. The five discharges were on strike at the time; the employees who were allegedly assaulted or threatened were not.

Diaz, Pineiro, and Martinez were on the picket line with other employees at Respondent's premises as Dorinda Suarez and other non-striking employees were leaving the plant at the end of the workday on June 28. Suarez had demonstrated her alliance with Respondent respecting the strike and an animosity toward her striking co-workers.[3] . Suarez came out of the plant on that June 28 occasion, swinging her handbag and shouting that the picketing employees were "whores." Swinging her handbag in a circular motion, Suarez struck Diaz in the face, knocking off and breaking Diaz' glasses and causing Diaz to cover her face with her hands to protect herself. Seeing Suarez thus assault Diaz, Martinez dashed up and was also struck by Suarez as Martinez attempted to hold Suarez' hand to restrain Suarez from continuing to hit Diaz. One or two men from the plant immediately then pulled Suarez inside. The entire incident lasted a few seconds. Pineiro observed, but was not in the immediate area of, the incident until Suarez had gone back into the plant. Reyes was nowhere near the area, being several blocks away from the plant at the time. She later passed by the plant on her way home after being informed of the incident, and while doing so Reyes was arrested by a police officer who apparently had come to the scene to investigate the incident. The officer took Reyes to a police station where Suarez signed a complaint alleging that Reyes had assaulted Suarez "by striking her with her pocketbook which was being swung wildly." The following day Suarez also signed similar complaints against Pineiro, Martinez, and Diaz.

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[3]While passing the picket line as she was reporting for work on June 27, Suarez remarked that she wished the strikers "would die." And on June 28, she urged employee Alicia Campoverdo to continue reporting for work despite the strike.

The Suarez complaints were heard before a Magistrate in North Bergen Municipal Court and the four defendants were found guilty as charged.

Respecting Colon's discharge, there is no evidence that she threatened either Ferruli or Ramon with "bodily harm and abusive language."

Concluding findings, unfair labor practices

The record establishes, as the General Counsel contends, that Respondent coercively interrogated employees concerning union membership and activities, created the impression of keeping employee's union activities under surveillance, threatened employees with plant closure and other reprisals to discourage their union membership and activities, assaulted union organizers in the presence of striking employees (*Clear Lake Hospital,* 223 NLRB 1, 7-8 [1976]), offered and promised its employees additional pay to abandon the strike, warned employees of the futility of union membership and activities, and refused to pay its employees accrued vacation pay because they engaged in a strike (*N.L.R.B. v. Great Dane Trailers, Inc.,* 388 U.S. 26 [1967]). Further citation of authorities is hardly necessary to show that all of such conduct violated the Act. The record further establishes that the strike beginning on June 27, 1978, was caused and prolonged by Respondent's unfair labor practices (including the unlawful discharge of the five employees hereinafter found) and that it therefore was an unfair labor practices strike. *N.L.R.B. v. Cast Optics Corp.,* 458 F.2d 398, 407-408 (C.A. 1972), cert. denied 409 U.S. 850. In July 1978, Respondent also threatened its striking employees with permanent replacement if they did not cease their strike and return to work, and it did begin replacing them and refuse the unconditional offer of most of them to return to work, notwithstanding that the strike was an unfair labor practices strike. Respondent thus further violated Section 8(a)

(3) and (1) of the Act by refusing strikers' unconditional offers to return and it also violated the Act by threatening to replace them unless they abandoned the strike and returned by August 1, 1978. *Mastro Plastics Corp. v. N.L.R.B.*, 350 U.S. 270, 278 (1956); *N.L.R.B. v. Cast Optics Corp., supra,* and cases cited therein; *Accurate Die & Mfg. Corp.*, 242 NLRB No. 46, 101 LRRM 1139 (1979); *Romona's Mexican Food Products,* 203 NLRB 663, 670 (1970), enf'd 531 F.2d 390 (C.A. 9, 1975).

This leaves the matter of the five discharges. The five discriminatees were engaged in a protected strike and they did not engage in any strike misconduct attributed to them by Respondent. Even assuming, for discussion purposes only, that Respondent believed in good faith that these employees had engaged in such misconduct, Respondent violated Section 8(a) (1) and (3) of the Act by discharging them for such erroneous reason. *N.L.R.B. v. Burnup & Sims,* 379 U.S. 21, 22 (1964); *General Motors Corporation,* 281 NLRB 472, 476-477 (1975), enf'd 535 F.2d 1246 (C.A. 3, 1976). In determining whether Diaz, Martinez, Pineiro, and Reyes participated in strike misconduct, I have, of course, duly considered the fact of the guilty verdicts against them in the Municipal Court proceedings. The record of such proceeding was not introduced in evidence. Such verdicts are not conclusive here, however, and the record in this case overwhelmingly establishes that none of the five women assaulted or threatened to assault Suarez or any other fellow employee. *N.L.R.B. v. Pacific Intermountain Express Company,* 228 F.2d 170, 176 (C.A. 8, 1955), cert. denied 351 U.S. 952; *N.L.R.B. v. Western Meat Packers, Inc.*, 368 F.2d 65, 70 (C.A. 10, 1966); *Hendon & Company, Inc.*, 197 NLRB 813, 819 (1972). In the circumstances it is unnecessary to discuss, although I have considered, the additional contentions advanced by the General Counsel relating to the discharge and the dischargee's entitlement to reinstatement and other relief, except to indicate that they are independently meritorious. *N.L.R.B. v. Thayer Co.*, 213 F.2d 748,

755-757 (C.A. 1, 1956), cert. denied 348 U.S. 883; *Local 833, UAW-AFL-CIO (Kohler Company) v. N.L.R.B.*, 300 F.2d 699, 703-704 (C.A. D.C., 1962), cert. denied 370 U.S. 911; *Coronet Casuals, Inc.*, 207 NLRB 304, 305 (1973).

V. *Representation Issues*

The representation matters requiring resolution here are Union Objections Nos. 1, 3, 4, and 6, and challenges to the ballots of James Garcia, Leenert Vermeer, Daniel Brown, Marianne Sasek, Linda Woods, Ondina Pineiro, Aleida Diaz, Maria Colon, Miriam Reyes, Rosa Martinez, Nelly Reyes, Virginia Ortega, and Rosa Mercado. It is recalled that the election was conducted on August 21, 1978, and that the eligibility date was the payroll period ending July 8, 1978.

Objections. Union Objections Nos. 1, 3, 4, and 6 are as follows:

> 1. On or about June 30, 1978, and continuing to date, the employer failed and refused to pay those employees who had joined the strike their accrued vacation which was due and payable on June 30, 1978, because of their Union activities.
>
> 3. On or about July 12, 1978, the Employer discharged its employees Ondina Pineiro, Aleida Diaz, Miriam Reyes, Maria Colon and Rosa Martinez because of their Union activities.
>
> 4. On July 4, the Employer threatened employees with reprisals if they engaged in Union activities.
>
> 6. During July 1978, the Employer threatened unfair labor practice strikers with permanent replacement.

Having sustained unfair labor practices allegations to a like effect, I accordingly also find merit in Union Objections Nos. 1, 3, 4 and 6.

Challenges. Respondent maintains that *Pineiro, Diaz, Colon, Martinez,* and *Miriam Reyes* were discharged for cause and therefore ineligible to vote. The Union contends that they were eligible because they had been unlawfully discharged. Having found that these employees had been discharged unlawfully, I find that they were eligible to vote in the election conducted on August 21, 1978.

The Regional Director's Supplemental Decision of November 29, 1978, states that *Ortega, Mercado,* and *Nelly Reyes* were hired in July 1978. The Union maintains that these employees were hired to replace unfair labor practice strikers and thus were ineligible to vote. Respondent contends that they were permanent replacements for economic strikers and therefore were eligible. Having found that the strike was an unfair labor practices strike, I find that Ortega, Mercado, and Nelly Reyes were "replacements for unfair labor practice strikers" and therefore ineligible to vote. *Larand Leisurelies, Inc.,* 222 NLRB 838 (1976).

The Union maintains that *Sasek* and *Woods* were office clericals and therefore not eligible to vote as within the office-clerical exclusion from the unit; Respondent asserts that they were warehouse employees and therefore within the unit. Sasek and Woods are classified in Company records as "office" employees. Sasek was a billing clerk in an office located in the warehouse building. Woods worked in the main office and at times in a warehouse office; she performed filing and also operated office equipment making out invoices. Although they occasionally helped out in the warehouse itself on an irregular basis, this was a very minor portion of their duties. Sasek and Woods, I find, were office clericals who were not eligible to vote.

The Union challenged *Brown* as a temporary and casual summer employee. Respondent claims that Brown was

employed on a regular basis. He was a college student and was employed in the warehouse for about 2 months during the summer of 1978. He returned to college and did not work after August 1978, and there is no showing that he would continue his employment with Respondent. I sustain the Union's challenge to Brown's eligibility. *Sandy's Stores, Inc.*, 163 NLRB 728, 729 (1967); *Crest Wines and Spirits, Ltd.*, 168 NLRB 754 (1967).

The Union challenged *Garcia's* eligibility on the ground that, as a designer, he is a professional and does not have a community of interest with production and maintenance employees in the unit; the Union asserts that he is also ineligible as a supervisor and confidential employee. Respondent contends that Garcia falls within the production-and-maintenance category and that he is neither a confidential employee nor a supervisor. His payroll classification is "designer," and he testified that he is the "assistant designer." He has completed technical studies at an architectural school and has completed two designing courses and earned 70 credits at Fashion Institute of Technology. His working hours are flexible and his yearly salary is $30,000.00 as opposed to the average hourly wage of approximately $3.00 paid to unit employees. Garcia devotes most of his time to making patterns from ideas given him by a designer who does such work for another company as well. I find that Garcia occupies a professional category and that, in any event, his duties and interests "are dissimilar from those of the production employees" as to warrant his exclusion from the unit. *J. P. Stevens & Company, Inc.*, 123 NLRB 758, 760 (1959).

The Union would exclude *Vermeer* from the unit as a guard, a supervisor, and a confidential employee. Respondent maintains he is none of these. Vermeer opens the plant before work and closes it at the end of the work day, he "watches" the employees while in the plant, he punches and signs employees' timecards when the cards "are not all right," he inspects the handbags of employees leaving

the plant, and he has requested an unauthorized individual to leave the plant. I find that Vermeer is within the "guard" exclusion and was therefore ineligible to vote. *Walterboro Manufacturing Corp.*, 106 NLRB 1383 (1953); *Louis F. Dow Company,* 111 NLRB 609, 610 (1955); *Wonderknit Corporation,* 123 NLRB 53, 56 (1959).

In summary: I sustain the challenges to Vermeer, Garcia, Brown, Sasek, Woods, Ortega, Mercado, and Nelly Reyes. And I overrule the challenges to Pineiro, Diaz, Colon, Martinez, and Miriam Reyes.

I shall recommend that the ballots of Pineiro, Diaz, Colon, Martinez, and Miriam Reyes be opened and counted together with the ballots cast by all other eligible voters as previously determined in the Regional Director's Supplemental Decision of November 29, 1978, and that a revised Tally of Ballots be issued. If the Union wins the election, I further recommend that the appropriate certification be issued. However, if the results show that the Union did not obtain a majority of valid ballots case, then I would recommend that the election be set aside on the basis of Union Objections Nos. 1, 3, 4, and 6 which I have found to be meritorious.

Conclusions of Law

1. Respondent (Jacques Syl and Biquette, respectively) is an employer within Section 2(6) and (7) of the Act.

2. The Union is a labor organization within Section 2(5) of the Act.

3. All full time regular part time production and maintenance employees including shipping and receiving employees employed by Jacques Syl and Biquette at West New York, New Jersey, but excluding all office clerical

employees, professional employees, guards and supervisors as defined in the Act, constitutes an appropriate unit for the purposes of collective bargaining within Section 9(b) of the Act.

4. Respondent has violated Section 8(a) (1) of the Act by: interrogating employees concerning membership and activities in the Union; threatening employees with discharge and plant closure and other reprisal for reasons of union membership and activities; assaulting union organizers in the presence of employees; threatening unfair labor practices strikers with permanent replacement if they did not cease their strike and return to work by August 1, 1978; warning employees of the futility of becoming or remaining members of the Union; offering and promising employees additional pay to give up their strike and return to work; and creating the impression of surveillance of employees' union activities.

5. Respondent has violated Section 8(a) (3) and (1) of the Act by: discharging Maria Colon, Aleida Diaz, Ondina Pineiro, Rosa Martinez, and Miriam Reyes for union membership and activities; refusing to pay employees accrued vacation pay because of their union membership and activities; and refusing to reinstate unfair labor practices strikers upon unconditional request to return to work.

6. The aforesaid unfair labor practices affect commerce within Section 2(6) and (7) of the Act.

7. Union Objections Nos. 1, 3, 4, and 6 are sustained in Case No. 22-RM-533 and warrant setting aside the election of August 21, 1978.

8. Challenges to the ballots of Pineiro, Diaz, Colon, Martinez, and Miriam Reyes are overruled.

9. Challenges to the ballots of the following individuals are sustained: James Garcia, Leenert Vermeer, Daniel Brown, Marianne Sasek, Linda Woods, Nelly Reyes, Virginia Ortega, and Rosa Mercado.

The Remedy

Having found that Respondent has engaged in unfair labor practices violative of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action in order to effectuate the policies of the Act.

The conventional remedy for unlawful discharges is reinstatement and backpay, and the Board holds that backpay for strikers discharged during s strike begins running from the date of their discharge, as well. *Abilities & Goodwill, Inc.*, 241 NLRB No. 5, 100 LRRM 1470 (1979); *Lien Chemical Co.*, 241 NLRB No. 67, 100 LRRM 1519 (1970). The backpay directed as to Pineiro, Diaz, Colon, Martinez, and Miriam Reyes will therefore begin running from July 14, 1978, the date that each was notified of her discharge. Unfair labor practice strikers are entitled to return to their jobs upon unconditional application therefor, and 35 strikers (including the aforenamed five discriminatees and listed on Appendix B[6] attached hereto) made such application, effective September 18, 1978. It has been found that Respondent unlawfully refused to

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[6]The list inadvertently contains the name of Nerys Acevedo who returned to work on August 26, 1978. Guillermina Camejo also appears on the list. However, as noted in the Regional Director's Supplemental Report of November 29, 1978, Camejo had been disabled and had not worked for Respondent since December 1977 and the parties agreed in the Representation case that a challenge to her ballot should be sustained on the ground that on the election date (August 21, 1978) she had no reasonable expectancy of returning to work. I have therefore omitted their names from Appendix B.

take back most of these strikers. The conventional relief in this situation requires that Respondent reinstate those strikers whose unconditional application Respondent has not granted and to make all strikers whole for earnings lost since September 18, 1978, including those strikers who were permitted to return at a later date. Losses of earnings will also include all summer and winter vacation payments to which strikers are entitled from the date of the strike (June 27, 1978). All backpay shall be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[7]

It is recalled that the General Counsel also seeks a *Gissel* remedy. During the first week of July 1978, there were 74 employees in the aforedescribed appropriate bargaining unit. This figure includes unfair labor practices strikers and excludes all replacements for such strikers (see *Larand Leisurelies, Inc., supra*), and also excluded those individuals as to whom challenges have been sustained. The record establishes that by the first week of July 1978, 41 or a majority of the 74 unit employees had designated the Union as their bargaining representative. Respondent's conduct, related above, flagrantly violated employee rights under Section 8(a)(1) and (3) of the Act, and I find without need for further explication, that there is impelling justification for a bargaining order in the circumstances of this case. *N.L.R.B. v. Gissel Packing Co., supra; Jim Baker Trucking Company*, 241 NLRB No. 14, 100 LRRM 1487 (1979); *Hendon & Company, Inc.*, 197 NLRB 813, 819 (1972). And I consider such bargaining order appropriate whether or not a revised Tally of Ballots will show the Union to have won the election of August 21, 1978. Cf. *Pope Maintenance Corporation*, 228 NLRB 326, 348 (1977); *The Great Atlantic & Pacific Tea Company*, 230 NLRB 766 (1977). I accordingly conclude that

[7]See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

at all times since July 8, 1978, the Union has been and it continues to be the exclusive bargaining representative of the employees in the above-described appropriate unit within Section 9(b) of the Act. *Trading Port, Inc.*, 219 NLRB 298, 300-301 (1975).

Upon the foregoing findings, conclusions, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[8]

ORDER

Respondent (Jacques Syl Knitwear, Inc., and Biquette, Inc., West New York, New Jersey), and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating employees concerning union membership and activities.

(b) Threatening employees with discharge, plant closure, or any other reprisal for reasons of union membership and activities.

(c) Threatening employees with permanent replacement if they do not abandon a strike.

(d) Warning employees of the futility of becoming or remaining union members.

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[8]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

(e) Assaulting or otherwise intimidating union organizers.

(f) Offering and promising employees additional pay or other benefits to give up participating in strikes or in any other protected activities.

(g) Creating the impression of, or engaging in, surveillance of union activities.

(h) Discharging or otherwise discriminating against employees for participating in union or other protected activities.

(i) Refusing to pay accrued vacation pay to employees for engaging in strike activity.

(j) Refusing to reinstate unfair labor practice strikers upon their offer to return to work.

(k) In any other manner interfering with, restraining, or coercing employees in the exercise of rights under Section 7 of the Act.

2. Take the following affirmative action:

(a) Offer to Aleida Diaz, Ondina Pineiro, Rosa Martinez, Miriam Reyes, and Maria Colon reinstatement to their former jobs or to substantially equivalent positions if their jobs no longer exist, without prejudice to their seniority and other rights and privileges, and make them whole as set forth in "The Remedy" section above for any loss of earnings since July 14, 1978, including summer and winter vacation pay, suffered as a result of the discrimination against them.

(b) Offer to all employees on Appendix B, except to those presently in its employ, reinstatement to their former

jobs or to substantially equivalent positions if their jobs no longer exist, without prejudice to their seniority and other rights and privileges, dismissing, if necessary to effectuate such reinstatement, any person hired since the beginning of the strike on June 27, 1978. In addition, Respondent shall make all of these employees whole, as set forth in "The Remedy" section above, for any loss of earnings, including winter and summer vacation pay, suffered as a result of the discrimination against them.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due and the right of reinstatment under the terms of this Order.

(d) Upon request, recognize and bargain collectively with Local 162, ILGWU, AFL-CIO, as exclusive representative of its employees in the following appropriate unit and embody in a signed agreement any understanding reached:

> All full time and regular part time production and maintenance employees including shipping and receiving employees employed by Jacques Syl Knitwear, Inc., and Biquette, Inc., at its West New York, New Jersey, location, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

(e) Post at its plant and warehouse facilities in West New York, New Jersey, copies in both English and Spanish of the attached Notice marked Appendix C and mail such copies to each of its employees, including all

employees on Apendix B.[9] Copies of said notice, on forms provided by the Regional Director for Region 22 of the Board, after being duly signed by Respondent, shall be posted by it immediately upon receipt thereof, and be maintained for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.

IT IS FURTHER RECOMMENDED that Case No. 22-RM-553 be remanded to the Regional Director for the purpose of opening and counting, together with all other ballots, the ballots to which challenges have been overruled and that he issue a revised Tally of Ballots. It is also recommended that he issue the appropriate certification if the Union wins the election, but that he set aside the election results if the Union does not obtain a majority of valid votes cast.

Dated, Washington, D. C. September 28, 1979

RALPH WINKLER
Administrative Law Judge.

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[9]In the event the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX C—Decision and Order of the NLRB Dated March 5, 1981, 254 NLRB No. 150.

FJZ

254 NLRB No. 150

D—7459
West New York, NJ

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

JACQUES SYL KNITWEAR, Inc./BIQUETTE, Inc.

and

LOCAL 162, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO

Case 22—CA—10293

Decision and Order

Upon a charge filed on September 23, 1980, by Local 162, International Ladies' Garment Workers' Union, AFL—CIO, herein called the Union, and duly served on Jacques Syl Knitwear, Inc./Biquette, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 22, issued a complaint and notice of hearing on October 15, 1980, and an amended complaint on November 12, 1980, herein called the complaint, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of

the National Labor Relations Act, as amended. Copies of the charge, complaint and notice of hearing before an administrative law judge and amended complaint were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on September 5, 1980, following a Board election in Case 22—RM—533, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about September 8, 1980, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. Thereafter, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint, and raising an "affirmative defense."

On November 28, 1980, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment, with exhibits attached. Subsequently, on December 9, 1980, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent filed no response to the Notice To Show Cause.

Upon the entire record in this proceeding, the Board makes the following:

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[1]Official notice is taken of the record in the representation proceeding, Case 22—RM—533, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F. 2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F. Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

Ruling on the Motion for Summary Judgment

In its answer to the complaint, Respondent admits its refusal to bargain, but attacks the validity of the Union's certification. In this regard, it specifically denies the allegations of the complaint that Jacques Syl Knitwear, Inc., and Biquette, Inc., constitute a single integrated enterprise and a single employer within the meaning of the Act, and that the Union is the exclusive representative of the employees in an appropriate unit. It further asserts as an "affirmative defense" that an informal settlement agreement, which was entered into in the consolidated underlying representation and related unfair labor practice proceeding, and which provided for the resolution of ballots challenged in the August 21, 1978, election, was erroneously set aside.

Review of the record herein, including the record in Case 22—RM—533, shows that on August 21, 1978, following the filing of a Section 8(b)(7)(C) charge against the Union, an election was conducted pursuant to the Regional Director's direction in a unit of all production and maintenance employees, including shipping and receiving employees, of Jacques Syl Knitwear, Inc., and Biquette, Inc., as petitioned for by Respondent. The election resulted in a vote of 21 to 24 against the Union, with 36 challenged ballots, a number sufficient to affect the results. Thereafter, Respondent and the Union filed timely objections to the election.

After investigation, the Regional Director issued his Supplemental Decision on November 29, 1978, in which he overruled Respondent's objections in their entirety. The Regional Director sustained the challenges to 9 ballots, overruled the challenges to 14 ballots, and determined that, if a revised tally of ballots showed that the 14 ballots were not dispositive of the outcome of the election, the remaining 13 unresolved challenged ballots and certain of the Union's objections must await resolution of the issues

in a pending related unfair labor practice proceeding. Neither Respondent nor the Union sought leave for special permission to appeal the Regional Director's Supplemental Decision. Subsequently, on September 15, 1978, the Regional Director issued an order consolidating Case 22—RM—533 with the related unfair labor practice proceeding for hearing by an administrative law judge on the remaining 13 unresolved challenged ballots and certain of the Union's objections. On April 17, 1979, following the commencement of the hearing, the Administrative Law Judge, as recommended by the General Counsel, approved an informal settlement agreement between Respondent and the Union which, with respect to the representation proceeding, provided that the parties "withdraw their respective challenges" and that a revised tally of ballots be issued after the challenged ballots were opened and counted.

On April 30, 1979, the General Counsel filed with the Administrative Law Judge a Motion to Reopen and Resume Hearing based on Respondent's asserted noncompliance with the settlement agreement. On July 3, 1979, the Administrative Law Judge issued his Ruling and Order in which he found that there was no "meeting of the minds" among the parties with respect to that portion of the settlement agreement concerning the challenged ballots. Accordingly, the Administrative Law Judge withdrew his approval of that agreement and ordered that the hearing be resumed. The Board, by telegraphic order dated July 23, 1979, denied Respondent's request for special permission to appeal the Administrative Law Judge's Ruling and Order.

Thereafter, on September 28, 1979, the Administrative Law Judge issued his Decision in which he, *inter alia*, sustained 8 and overruled 5 of the 13 challenged ballots and recommended that the 5 ballots be opened and counted and that a revised tally be issued. Subsequently, Respondent filled exceptions to the Administrative Law Judge's

Decision in which it contended, *inter alia,* that the Administrative Law Judge erroneously had set aside the settlement agreement. On February 29, 1980, the Board issued its Decision and Order adopting the Administrative Law Judge's Decision.[2] Thereafter, a revised tally of ballots issued which showed 37 votes for, and 27 against, the Union. On September 5, 1980, the Union was certified as the exclusive bargaining representative of Respondent's employees. It thus appears that Respondent is attempting in this proceeding to relitigate issues fully litigated and finally determined in the representation proceeding.[3]

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[4]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue

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[2]247 NLRB No. 191.

[3]Moreover, in the above-cited Decision and Order, the Board adopted the Administrative Law Judge's findings with respect to the unfair labor practice allegations that Jacques Syl Knitwear, Inc., and Biquette, Inc. constituted a single integrated enterprise and that the unit in which the Regional Director had directed the election was appropriate.

[4]See *Pittsburgh Plate Glass Co. v. N.L.R.B.,* 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.[5]

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of Respondent

Jacques Syl Knitwear, Inc., a New Jersey corporation, maintains its principal place of business at 6301 Palisade Avenue, West New York, New Jersey, where it is engaged in the manufacture, sale, and distribution of children's garments and related products. During the 12-month period preceding issuance of the complaint, a representative period, Jacques Syl Knitwear, Inc., caused to be purchased, transferred, and delivered to its West New York plant goods and materials valued in excess of $50,000, of which goods and materials valued in excess of $50,000 were transported to said plant in interstate commerce directly from States of the United States other than the State of New Jersey.

Biquette, Inc., a New Jersey corporation, maintains its principal place of business at 6301 Palisade Avenue, West New York, New Jersey, where it is engaged in the purchase, sale, and distribution of children's garments and related products. During the 12-month period preceding

[5]In its answer, Respondent failed to specifically admit or deny various allegations of the complaint, including that the Union had requested bargaining. Pursuant to Sec. 102.20 of the Board's Rules and Regulations, Series 8, as amended, we deem these allegations to be admitted to be true. Furthermore, we note that such allegations involve matters which either were fully litigated and determined in the underlying representation proceeding or are supported by documentary evidence submitted by the General Counsel, the validity of which Respondent has not disputed.

issuance of the complaint, a representative period, Biquette, Inc., caused to be sold and distributed at its West New York plant products valued in excess of $50,000, of which products valued in excess of $50,000 were shipped from said plant in interstate commerce directly to States of the United States other than the State of New Jersey.

Jacques Syl Knitwear, Inc., and Biquette, Inc., are now, and at all times material herein have been, a single integrated enterprise with common ownership, directors, and officers and formulate and administer a common labor relations policy.

We find, based on the foregoing, that Jacques Syl Knitwear, Inc., and Biquette, Inc., are, and have been at all material times herein, a single integrated enterprise and single employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

Local 162, International Ladies' Garment Workers' Union, AFL—CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. The Representation Proceeding

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time production and maintenance employees, including shipping and receiving employees, employed by Respondent

at its West New York, New Jersey, location, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

2. The certification

On August 21, 1978, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 22, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on September 5, 1980, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. The Request To Bargain and Respondent's Refusal

Commencing on or about September 8, 1980, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about September 8, 1980, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since on or about September 8, 1980, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent, set forth in section III, above, occurring in connection with its operation described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.[6]

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining respresentative in the

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[6]The General Counsel has requested that the Board provide additional extraordinary remedial relief by ordering Respondent to furnish the Union a list of names and addresses of unit employees for 1 year from the date on which Respondent commences bargaining, to allow the Union access to its bulletin boards and other places for the posting of notices, and to reimburse the Board and the Union for their expenses in the investigation, preparation, and conduct of this case. We hereby deny the General Counsel's request since we find no circumstances here warranting a departure from our customary remedy in cases of this kind, and a reimbursement order is not justified under *Heck's Inc.*, 215 NLRB 765 (1974), and *Tiidee Products, Inc.*, 194 NLRB 1234 (1972).

appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Jacques Syl Knitwear, Inc./Biquette, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 162, International Ladies' Garment Workers' Union, AFL—CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time production and maintenance employees including shipping and receiving employees, employed by Respondent at its West New York, New Jersey, location, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since on or about September 5, 1980, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about September 8, 1980, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining

representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Jacques Syl Knitwear, Inc./Biquette, Inc., West New York, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local 162, International Ladies' Garment Workers' Union, AFL—CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time production and maintenance employees, including shipping and receiving employees, employed by Respondent

at its West New York, New Jersey, location, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its offices and facilities in West New York, New Jersey, copies of the attached notice marked "Appendix."[1] Copies of said notice, on forms provided by the Regional Director for Region 22, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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[1]In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(c) Notify the Regional Director for Region 22, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. March 5, 1981

John H. Fanning, Chairman

Howard Jenkins, Jr., Member

Don A. Zimmerman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local 162, International Ladies' Garment Workers' Union, AFL—CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All full-time and regular part-time production and maintenance employees, including shipping and receiving employees, employed by the Employer at its West New York, New Jersey, location, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

JACQUES SYL KNITWEAR, INC./
BIQUETTE, INC.

_____

(Employer)

Dated_____ By_____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Peter D. Rodino Jr. Federal Bldg., Rm. 1600, 970 Broad St., Newark, New Jersey 07102, Telephone 201-645-3652.

APPENDIX D—Excerpts from Transcript of Colloquy on April 16, 1979.

(594) BEFORE THE NATIONAL LABOR RELATIONS BOARD

TWENTY-SECOND REGION

IN THE MATTER

of

JACQUES SYL KNITWEAR, Inc., and BIQUETTE, Inc.,

Employer-Petitioner,

and

LOCAL 162, INTERNATIONAL LADIES GARMENT WORKER'S UNION, AFL-CIO,

Union.

Case No. 22-RM-533

970 Broad Street
Newark, New Jersey 07102
April 16th, 1979

The above-entitled matter came on for further hearing, pursuant to adjournment, at 3:45 p.m.

Before:

Ralph Winkler, Administrative Law Judge

Appearances:

Godfrey P. Schmidt, Esq., Attorney, 786 Broad Street, Newark, NJ, 07102, appearing on behalf of the Employer.

Melvin A. Gelade, Esq., Kapelsohn, Lerner, Reitman and Maisel, 24 Commerce Street, Newark, NJ, appearing on behalf of the Union.

Maria E. Balzano, Celeste Mattina, Field Attorneys, National Labor Relations Board, Region 22, 970 Broad Street, Newark, NJ, appearing on behalf of the General Counsel.

* * *

(596) *Proceedings* Time on Record: 3:45 p.m.

Judge Winkler: On the record.

Let the record show that the parties have been discussing settlement for quite awhile, and that the Charging Party, the Union, and the Respondent, have reached what, for them, is a resolution, in this matter.

The General Counsel objects to a portion of that.

Let me state the terms of the stated settlement, first, and then give the General Counsel an opportunity to state the General Counsel's objection.

And, before reading the terms, on the record, the parties have also agreed that we will meet tomorrow morning, at ten o'clock, at which time we will sign the document, and which will give us an opportunity to prepare the notice, meanwhile.

The parties understand, however, that by entering into an agreement, tonight, that I approve the agreement, that it's binding, on the parties, was of the date of their expression of approval.

The agreement, as I understand it, will provide as follows:

One. The Union, and Respondent, the respondent being the Employer in the representation case, each agrees to withdraw their respective challenges, and the parties, in the (597) representation case, and the case, then, will return to the Regional Director, and the parties agree to abide by the new election results.

The Union agrees to withdraw its charges, in this case.

The Respondent agrees—

Mr. Gelade: Excuse me, your Honor. I know you have said this, before, but if the case is a settlement, is it possible to settle the case, with a withdrawal—the way we are doing it—with a withdrawal of the charges?

Judge Winkler: Yes.

Mr. Gelade: It is?

Judge Winkler: Yes.

Mr. Gelade: Yes.

Miss Balzano: I understand, your Honor, that by the withdrawal of the charges, you are referring to the withdrawal of the complaint, upon condition of compliance, of the settlement agreement.

Judge Winkler: Only the General Counsel can really move for withdrawal of the complaint.

The Union can move to withdraw it's charges.

Should I approve the settlement, then I reserve ruling on the motion to withdraw the charges, until such date as compliance has been completed.

Or, should the board, meanwhile, should the General Cou

APPENDIX E—Excerpts from Transcript of Colloquy on April 17, 1979.

(612) BEFORE THE NATIONAL LABOR RELATIONS BOARD

22ND REGION

IN THE MATTER

of

JACQUES SYL KNITWEAR, Inc., and BIQUETTE, Inc.,

Employer-Petitioner,

and

LOCAL 162, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO,

Union,

JACQUES SYL KNITWEAR, Inc., and BIQUETTE, Inc.,

and

LOCAL 162, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO.

Case No. 22-RM-553

22-CA-8558, 22-CA-8655, 22-CA-8698, 22-CA-8713, 22-CA-8897

970 Broad Street
Newark, New Jersey 07102

The above-entitled matter came on for hearing, pursuant to Notice, at 11:40 A.M.

Before:

Honorable Ralph Winkler, Administrative Law Judge

Appearances:

Maria E. Balzano, Celeste J. Mattina, National Labor Relations Board 22nd Region, 970 Broad St., Newark, N.J., appearing as Counsel for the General Counsel.
(612a) Melvin Gelade, Esq., Melvin Gaiade, Esq., 24 Commerce Street, Newark, New Jersey 07102 appearing on behalf of the Petitioner.

Godfrey P. Schmidt, Godfrey P. Schmidt, 654 Madison Avenue, Rm. 1606, New York, N.Y. 10022, appearing on behalf of the Employer.

* * *

(614) *Proceedings*

Judge Winkler: On the record.

Let the record show that we marked for identification a 3 page document entitled Settlement Agreement. And will call this Joint Exhibit number 1.

All the parties have executed this document and I have approved it and it constitutes a complete disposition of both the complaint and the representation cases.

If you'll pardon just on little word—.

Mr. Schmidt: I think I was going to say that.

Judge Winkler: All right, let us—joint one is received.

(Document was marked as Joint Exhibit no. 1 for identification and received in evidence.)

* * *

APPENDIX F—Settlement Agreement, April 17, 1979.

UNITED STATES OF AMERICA
BEFORE NATIONAL LABOR RELATIONS BOARD

DIVISION OF JUDGES

IN THE MATTER

of

JACQUES SYL KNITWEAR, Inc., BIQUETTE, Inc.,

and

LOCAL 162, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO.

Cases Nos. 22-RM-8558 22-CA-8655, 22-CA-8698, 22-CA-8713, 22-CA-8997, 22-RM-533

Settlement Agreement

The undersigned Respondent and the undersigned Charging Party, in settlement of the above matter, and subject to the approval of the Administrative Law Judge for the National Labor Relations Board, HEREBY AGREE AS FOLLOWS:

POSTING OF NOTICE—Upon approval of this Agreement, the Respondent will post immediately in conspicuous places in and about its plant including all places where notices to employees are customarily posted, and maintain for a period of at least 60 consecutive days from the date of posting,

copies of the Notice attached hereto and made a part hereof, said Notices to be signed by a responsible official of the Respondent and the date of actual posting to be shown thereon. A Spanish translation of the Notice will also be posted.

COMPLIANCE WITH NOTICE—The Respondent will comply with all the terms and provisions of said Notice.

VACATION PAY—The Respondent will pay its employees vacation pay accrued on or about June 30, 1978.

REINSTATEMENT—1. All employees, including strikes listed in parapraph 34 of the Third Amended Complaint (except Miriam Reyes who waives any claim to reinstatement), striker replacements, returned strikers and employees who worked during the strike be placed on a single seniority list, with each person's seniority commencing on his or her date of hire.

2. Existing jobs and future jobs shall be filled, by job classification, according to seniority, provided, however, that no employee now working shall be displaced by any striker whose date of hire is subsequent to March 27, 1978.

BACK PAY—Respondent will pay a gross amount of $10,000, to be distributed among the official distributees on a pro rata basis.

NON-ADMISSION CLAUSE—Execution of this Agreement does not constitute an admission that the Respondent has violated the Act.

PERFORMANCE—Performance by the respondent with the provisions of this Agreement shall commence immediately after the agreement is approved by the Administrative Law Judge.

NOTIFICATION OF COMPLIANCE—The undersigned parties to this Agreement will each notify the Regional Director in writing what steps the Respondent has taken to comply herewith. Such notifications shall be given within 5 days, and again after 60 days, from the date of the approval of this Agreement. Upon completion of said 60-days period the Regional Director will advise the Administrative Law Judge concerning the status of compliance.

WITHDRAWAL OF CHARGES, etc.—The parties jointly move the Administrative Law Judge that the charges be withdrawn, the complaint dismissed, and the record closed contingent upon compliance with the terms of this Agreement.

IT IS FURTHER AGREED that Case No. 22-RM-533 be severed and returned for processing to the Regional Director, and for purposes of settlement that the parties withdraw their respective challenges in 22-RM-533 and that a revised tally of ballots be issued after the challenged ballots are opened and counted. If the Union is certified as majority representative upon the basis of the revised tally, the Respondent (Employer) further agrees to recognize and

bargain with the Union as the statutory representatives for the unit of employees involved in 22-RM-533.

JACQUES SYL KNITWEAR, Inc.
BIQUETTE, Inc.
By: Godfrey P. Schmidt April 17, 1979

LOCAL 162, INTERNATIONAL LADIES' GARMENT WORKERS' UNION
(Charging Party)
By Melvin L. Gelade April 17, 1979

Celeste J. Mattina 4/7/79
Maria E. Balzano 4/17/79
Counsel for the General Counsel
Approved:

RALPH WINKLER April 17, 1979
Administrative Law Judge
National Labor Relations Board

NOTICE TO EMPLOYEES

POSTED PURSUANT TO A SETTLEMENT AGREEMENT APPROVED BY AN ADMINISTRATIVE LAW JUDGE OF THE NATIONAL LABOR RELATIONS BOARD AN AGENCY OF THE UNITED STATES GOVERNMENT

WE notify our employees, as follows:

WE WILL NOT interrogate employees concerning union activities.

WE WILL NOT threaten to discharge employees, to close our plant, to cut back on benefits, or promise to grant benefits in order to discourage employees from engaging in union or other protected activities (including strikes) in behalf of LOCAL 162, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO, or any other labor organization.

WE WILL NOT assault union organizers.

WE WILL NOT engage in, or give our employees an impression that we are engaging in, surveillance of their union activities.

WE WILL NOT discharge employees or discriminate against them in any respect because of their union or other protected activities.

WE WILL NOT refuse to pay employees their vacation pay accrued as of June 30, 1978, (illegible) they engage in a strike and we will pay all strikers their vacation pay (illegible) as of June 30, 1979.

WE WILL reinstate our striking employees (illegible) according to (illegible)

WE WILL recognize and bargain in good faith with Local 162, International Ladies' Garment Workers' Union, AFL-CIO, if that union is certified as your collective bargaining representative.

JACQUES SYL KNITWEAR, INC.
BIQUETTE, INC.

(Employer)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, Room 1600, 16th floor, 970 Broad Street, Newark, New Jersey 07102 (Tel. No.: [201] 645-2100).

APPENDIX G—Regional Director's Letter April 23, 1979.

NATIONAL LABOR RELATIONS BOARD

REGION 22

Federal Building, 970 Broad Street

Newark, New Jersey 07102

April 23, 1979

Godfrey Schmidt, Esq.
654 Madison Avenue
Room 1606
New York, New York 10021

Jacques Syl Knitwear, Inc.
6301 Palisade Avenue
West New York, New Jersey
Att: Mrs. Cirla Fridman, Pres.

Melvin L. Gelade, Esq.
Kapelsohn, Lerner,
Reitman and Maisel
24 Commerce Street
Newark, New Jersey 07102

Local 162, International Ladies' Garment Workers' Union, AFL-CIO
3408 Bergenline Avenue
Union City, New Jersey 07083
Att: Gerry Rivera, Director

RE: Jacques Syl Knitwear, Inc.
and Biquette, Inc.
Case Nos. 22-CA-8558; 8655;
8698; 8713; 8897 and
22-RM-533

Dear Sirs and Madam:

As you are aware, on April 17, 1979, Administrative Law Judge Ralph Winkler approved a settlement agreement in the above cases which, *inter alia,* calls for the parties' withdrawal

of their respective challenges to the ballots of several individuals in connection with Case No. 22-RM-533. Judge Winkler further ordered that Case No. 22-RM-533 be severed for processing and that the challenged ballots be opened and counted and a revised tally of ballots issue.

Accordingly, pursuant to the above order, the ballots of James Garcia, Leenert Vermeer, Daniel Brown, Marianne Sasek, Linda Woods, Ondina Pineiro, Aleida Diaz, Maria Colon, Miriam Reyes, Rosa Martinex, Nelly Reyes, Virginia Ortega, and Rosa Mercado will be opened and counted on Thursday, April 26, 1979 at 10:00 a.m. in room 1600, Federal Building, 970 Broad Street, Newark, New Jersey. A representative of each party may be present to witness the count and accept service of the revised tally of ballots which will issue immediately after the counting of the ballots.

Very truly yours,

ARTHUR EISENBERG
Regional Director

APPENDIX H—General Counsel's Motion to Reopen and Resume Hearing Dated April 30, 1979.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Twenty-Second Region

JACQUES SYL KNITWEAR, Inc.
BIQUETTE, Inc.

and

LOCAL 162, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO.

Cases Nos. 22-CA-8558, 22-CA-8655, 22-CA-8698, 22-CA-8713, 22-CA-8897, 22-RM-533.

Motion to Reopen Record and Resume Hearing

Pursuant to Section 102.24 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, the undersigned counsel for the General Counsel of the Board hereby move to reopen the record and resume the hearing in this matter based on Respondent's noncompliance with the Informal Settlement Agreement in the instant cases, executed by the parties and approved by Administrative Law Judge Ralph Winkler on April 17, 1979.

The basis for this Motion is more fully set forth in the Memorandum filed herewith.

Respectfully submitted,

MARIA E. BALZANO
CELESTE J. MATTINA
Counsel for the General Counsel
National Labor Relations Board
Twenty-second Region
970 Broad Street
Newark, New Jersey 07102

Dated at Newark, New Jersey,
this 30th day of April, 1979.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Twenty-Second Region

JACQUES SYL KNITWEAR, Inc.
BIQUETTE, Inc.

and

LOCAL 162, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO.

Cases Nos. 22-CA-8558, 22-CA-8655, 22-CA-8698, 22-CA-8713, 22-CA-8897, 22-RM-533.

Memorandum in Support of Motion to Reopen the Record

Complaint issued in the above cases alleging violations by Jacques Syl Knitwear, Inc., and Biquette, Inc., (herein called Respondent) of Section 8(a) (1) and (3) of the National Labor Relations Act, as amended, (herein called the Act). By order dated December 15, 1978 Case No. 22-RM-533 was consolidated with the unfair labor practice cases for purposes of hearing, ruling and decision by the Administrative Law Judge as to the eligibility status of 13 employees whose ballots were challenged and which would determine the outcome of the election and as to the Union's Objections Nos. 1, 3, 4 and 6.[1]

[1]The Order Consolidating Cases is attached hereto as Exhibit A.

A hearing was held before Administrative Law Judge Ralph Winkler on March 26, 27, 28, 29 and April 16 and 17, 1979 in the above-captioned matters. On April 17, 1979 the hearing was adjourned indefinitely after the parties executed a settlement agreement which was approved on the record by the Administrative Law Judge. The Settlement Agreement is attached hereto as Exhibit B. The settlement provided, *inter alia,* for the withdrawal of the parties' respective challenges in Case No. 22-RM-533.

The Regional Director, by letter dated April 23, 1979, notified the parties that, pursuant to the settlement agreement, the ballots of the 13 unresolved determinative challenges would be opened and counted on April 26, 1979. This letter is attached hereto as Exhibit C.

On April 25, 1979, counsel for Respondent sent telegrams[2] advising that it objected to the opening of the ballots unless all remaining unopened ballots, including all challenges sustained by the rulings of the Regional Director in his Supplemental Decision (Exhibit F annexed) in Case No. 22-RM-533, are also opened and counted. No request for special permission to appeal from these rulings was filed. As set forth in Exhibit F (fn. 16), those rulings are final. Respondent further advised that, unless all those ballots are opened, it considers the settlement agreement executed on April 17, 1979 null and void.

Conclusions:

It is clear that the settlement agreement pertained only to the 13 remaining unresolved challenges which had been consolidated with the unfair labor practice cases for hearing before the Administrative Law Judge. All other

[2]They were sent by attorneys Godfrey Schmidt and Samuel D. Rosen. Mr. Rosen has indicated that he has been authorized by Respondent to state its objection to the opening of only 13 ballots, but has not indicated whether he has been retained as counsel for Respondent in this matter. Copies of the telegrams are attached hereto as Exhibits D and E.

challenged ballots had been disposed of by the Regional Director's Supplemental Decision.

It is submitted that Respondent has now simply decided to avoid its obligations under the settlement agreement. The net result is that it has effectively delayed the proceedings in these cases.

Regretfully, we have no recourse but to request that approval of the Settlement Agreement in this matter be withdrawn and that the hearing be reopened and carried to a conclusion as expeditiously as possible. The rights of a large number of employees are involved herein and any further delay in resolving them should be kept to the minimum.

April 30, 1979
Newark, New Jersey.

Respectfully submitted,

MARIA E. BALZANO
CELESTE J. MATTINA
Counsel for the General Counsel
National Labor Relations Board
Twenty-second Region
970 Broad Street
Newark, New Jersey 07102

This will certify that copies of the foregoing Motion To Reopen the Record and Resume the Hearing and Memorandum In Support thereof, with appendices, have this date been duly served upon counsel by registered mail and the other parties as follows:

Registered Mail

Godfrey P. Schmidt, Esq.
654 Madison Avenue
Room 1606
New York, New York 10021

APPENDIX I—Administrative Law Judge's Order Dated May 11, 1979.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Division of Judges

Washington, D. C.

JACQUES SYL KNITWEAR, Inc.
BIQUETTE, Inc.

and

LOCAL 162, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO.

Cases Nos. 22-CA-8558, 22-CA-8655, 22-CA-8698, 22-CA-8713, 22-CA-8897, 22-RM-533.

Order

Upon consideration of the General Counsel's Motion, dated April 30, 1979, and of Respondent's Mailgram communications of April 25, 1979,

IT IS HEREBY ORDERED that the Settlement Agreement of April 17, 1979, be set aside and "inoperative" and that hearing in this matter be resumed. The parties will be accordingly advised concerning the resumption date.

Dated: May 11, 1979

RALPH WINKLER
Administrative Law Judge

APPENDIX J—Order of Administrative Law Judge Dated May 29, 1979.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Division of Judges

Washington, D. C.

JACQUES SYL KNITWEAR, Inc.
BIQUETTE, Inc.

and

LOCAL 162, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO.

Cases Nos. 22-CA-8558, 22-CA-8655, 22-CA-8698, 22-CA-8713, 22-CA-8897, 22-RM-533.

Order

IT IS ORDERED that the Hearing be resumed on June 19, 1979, at 11:00 a.m. in Room 1600, Federal Building, at 970 Broad Street, Newark, New Jersey. The Hearing at this time will be limited to matters raised by Mr. Schmidt's

affidavit of May 8, 1979, namely, the Settlement Agreement of April 17, 1979, and the representative status of Samuel D. Rosen in behalf of Respondent on April 25, 1979.

Dated: May 29, 1978

RALPH WINKLER
Administrative Law Judge

APPENDIX K—Excerpts From Transcript of Colloquy, June 19, 1979.

(616)

BEFORE THE NATIONAL LABOR RELATIONS BOARD

22nd Region

IN THE MATTER

OF

JACQUES SYL KNITWEAR, Inc. and BIQUETTE, Inc.,

Employer-Petitioner,

and

LOCAL 162, INTERNATIONAL LADIES' GARMENT WORKERS UNION, AFL-CIO,

Union,

JACQUES SYL KNITWEAR, Inc. and BIQUETTE, Inc.,

and

LOCAL 162, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO.

Case Nos. 22-RM-533, 22-CA-8558, 22-CA-8655, 22-CA-8698, 22-CA-8713, 22-CA-8897.

970 Broad Street
Newark, N. J.
Tuesday, June 19, 1979

The above-entitled matter was reopened, pursuant to Notice, at 11:07 a.m.

Before:

Honorable Ralph Winkler, Administrative Law Judge.

Appearances:

Celeste J. Mattin, Esq., NLRB, 970 Broad Street, Newark, N. J. appearing as Counsel for the General Counsel.
(616/a) Maria E. Balzano, Esq., NLRB, 970 Broad Street, Newark, N. J., appearing as Counsel for the General Counsel.

Melvin L. Gelade, Esq., of Kapelsohn, Lerner, Reitman & Maisel, 24 Commerce Street, Newark, N. J. 07102 appearing on behalf of the Union.

Godfrey P. Schmidt, Esq., 654 Madison Ave., Rm. 1606, New York, N. Y. 10021, appearing on behalf of the Employer-Petitioner.

(627) the Respondent takes the position, and please check me if I'm wrong, but wait until I finish.

The Respondent takes the position that referred to all challenges that have and had been filed in the companion representation case.

Is that correct, Mr. Schmidt?

Mr. Schmidt: That's correct.

Judge Winkler: I take it that the position of the General Counsel and the Union is that when the settlement agreement speaks of the withdrawal of challenges, both the

General Counsel and the Union state that their understanding is, that it referred only to the undisposed challenges.

Is that correct?

Mr. Gelade: Correct.

Miss Balzano: Yes.

Judge Winkler: And we're going to have to set out a little chronology and I'll set out the chronology here.

But I want to get a few thoughts out into the open.

Now, I don't know, but I would presume, that the respective attorneys here at one time or another during the period of the settlement negotiations may have had some discussions that might shed some light on this question.

I know that I did participate in settlement negotiations with the parties with the knowledge and the consent of all the parties.

(628) However, so far as I am concerned, I want to make this very clear, I never had any discussion with any party which might throw any light on the question in issue.

I think there came a point in the last day of settlement, or the day of settlement, that I suggested the parties get together.

I know I had a rather lengthy discussion with the parties dealing with the C-case aspects of the case.

But in terms of the R-case aspects of the case, I never had any discussion.

I did suggest to the parties, I believe, that perhaps one way of disposing of the case would be to withdraw the challenges.

I never, again, went into the question with any of the parties as to what I meant by that, or indeed if I meant anything by it.

The delicate part of today's session will be that I think we will have to take the statement of counsel, statement of counsel.

By that I mean, all counsel here, as to what discussion if any, were had between the respective counsel on the question of what was meant in the settlement agreement by withdrawal of challenges.

And I don't like to say what I'm going to say next, but I must.

(633) to be withdrawn—challenges were to be withdrawn.

It should also be noted in connection with the Regional Director's supplemental decision, that no request for review was ever made or filed.

There's no question about that, is there?

(No response)

So, then we come to the settlement agreement of April 17, 1979.

And I take it, let me ask starting from right to left, Mr. Schmidt, in connection with the settlement talks themselves dealing with the question as to the meaning of the phrase withdrawal of challenges—

Mr. Schmidt: "The parties withdraw their respective challenges in 22-RM-533."

Judge Winkler: Did you have any discussion with either the Union representative or either the representatives of the General Counsel as to the meaning of the phrase, withdrawal of challenges.

Mr. Schmidt: I didn't have any discussion with anybody about the meaning of that phrase.

I took it to mean what it said.

And I certainly didn't inquire as to what other people meant by it, because I assumed they meant what it said.

Judge Winkler: Let me ask the General Counsel.

I'll ask both representatives of the General Counsel.

(634) Miss Mattina, did you have any discussion with Mr. Schmidt delineating the import of that phrase?

Miss Mattina: Not with Mr. Schmidt.

Miss Balzano: I did not have any discussions with any of the parties.

Judge Winkler: The Union?

Mr. Gelade: No, the only discussions I believe there were directly between Mr. Schmidt and his client and me involved the unfair labor practice back pay and—

Judge Winkler: The answer then is no?

Mr. Gelade: That's correct.

Judge Winkler: So there's nothing that occurred during the settlement.

I now have to decide whether there was a lack of mutuality of understanding, really, concerning this agreement.

Mr. Schmidt: I don't agree with that statement of the issue before you, but you're entitled to do what you want.

Judge Winkler: Can I hear you now, sir, on what your position is on that.

Assuming that there is this disagreement between the parties.

Mr. Schmidt: Assuming that there was a subjective disagreement between the parties, the only question is what (635) does the phrase in that contract mean.

"The parties withdraw their respective challenges in 22-RM-533."

That I take it is to be the issue before your Honor.

Judge Winkler: Yes, sir.

Now, how do I approach that question.

How do you suggest I approach answering that?

Mr. Schmidt: Well, then the ordinary rule of contract interpretation is that when the language is clear, there is no need to have resort to previous conversations to shed light on its meaning.

Judge Winkler: In any event, previous conversations don't help in this case.

Mr. Schmidt: That's right.

Judge Winkler: Because there were none.

So, the question then is whether or not the phrase means to withdraw all challenges, or to withdraw only the unresolved challenges.

That's the question.

Mr. Schmidt: Well, that's the question that has been raised subsequently.

But the way it's written here, there's no reference to 13 challenges or to some challenges.

It says—or to unresolved challenges—they say "withdraw their respective challenges in that case."

(636) Judge Winkler: Okay, I think I understand your position.

Mr. Schmidt: You understand my position.

And incidentally I might say that I'm saying this from this desk here, but I've put myself under oath on two affidavits on that, very extensively so that I don't make it a point ever to lie when I'm talking to an Administrative Judge or a Judge in the judicial circuits.

This was honestly my opinion all along.

I so informed my clients and indeed it was one of the reasons why my clients assented to the—

Judge Winkler: Let me ask the General Counsel.

Approaching the question from the standpoint of Mr. Schmidt, where the agreement states that the parties withdraw their respective challenges—

Where the agreement states that the parties withdraw their respective challenges in 22-RM-533, the Respondent argues that there is no limitation on that.

There are no words of qualification.

Why then isn't it reasonable to argue that it means just what it says, namely, to withdraw all challenges.

Miss Mattina: The position of General Counsel is that the only challenges in existence before your Honor were the 13 unresolved challenges.

The rest of them had been disposed by decision from the

(637) Regional Director.

The decision as to the eligibility of those individuals who have cast ballots was final and binding and no special request for permission to appeal before the Board had been filed—

Judge Winkler: Let's assume that all that is so.

You say it was beyond the possible—that the parties could not have agreed to withdraw all challenges?

Miss Mattina: Certainly, General Counsel could not have agreed to withdraw all challenges when the Regional Director had made a final and binding decision on the eligibility of the remaining challenges.

Judge Winkler: Would you say that the position of Mr. Schmidt is an unreasonable position?

Miss Mattina: I don't believe that I have characterized Mr. Schmidt's position in terms of being reasonable or unreasonable.

Judge Winkler: I mean is this a matter about which reasonable men may differ, is that what you're arguing?

That reasonable men and women may differ, is that what you're saying?

Miss Mattina: The fact is Mr. Schmidt contends that we agreed to one thing.

General Counsel contends that we agreed to another thing.

(638) There certainly was no meeting of the minds and we would submit based on International of the motion picture industry, that's 197NLRB1187—

Judge Winkler: What's the name of the case, please?

Miss Mattina: IATSE, Local 659.

That there was no meeting of the minds and the settlement should be—

Well, at the very best, there was no meeting of the minds and the settlement should be set aside.

Judge Winkler: How about the Union, does the Union have anything to say?

Is the General Counsel finished?

Miss Mattina: Yes.

Mr. Gelade: As to the Union's understanding of the settlement, I would concur with the General Counsel that there were—

Judge Winkler: May I interrupt one second—off the record.

(Discussion off the record)

On the record.

Mr. Gelade: It was the Union's understanding that the settlement discussion centered on the case that was before the Judge at the time we discussed settlement.

And that case involved certain 8(a) (3)s, certain 8(a) (1)s and certain objections and challenges.

(639) And the withdrawal of the objections was by the Union.

In looking at the settlement agreement, I believe I had to sign a withdrawal at the termination of the proceedings and the signing of the settlement agreement that I was requested to withdraw the remaining Union's objections in the case.

Because there were certain objections that were still alive.

Judge Winkler: Objections or challenges?

Mr. Gelade: Objections.

Before the Regional Director would agree to issue an order, whatever, on the challenges.

The Respondent, or the Employer in the R-case, was not asked to do so because there were no live objections on his part because they had been disposed of.

In my negotiations, or my understanding of the negotiations, and of course what has been memorialized in this agreement, is merely the remaining challenges and objections and unfair labor practice charges that were before the Judge at that time.

I had no question in my mind and none was raised as to the meaning of that.

However, it—the question that you posed about the meeting of the minds or mutual understanding that reasonable people may differ that you posed to General Counsel, I might take the liberty of saying that from the very beginning, and (640) I think it's explicit in my May 14 letter, that notwithstanding that I'm convinced that I

know what the settlement spoke of, I can conceive that someone else from the other side may in all reasonableness have a different opinion.

And I don't, in my own mind believe so, but I really can see that this can exist.

The Union's position has been from the very beginning that if there is truly a position taken by the Employer that every challenge including people who were hired after the eligibility date was up for grabs, then there was no meeting of the minds.

It's like the old contracts case where the contract refers to a certain ship sailing out of Boston and there are two ships of the same name.

It doesn't seem to me to be the kind of thing that would warrant one calling the other one uncredible.

And that's been my position since the beginning and the Union continues to maintain that position.

Mr. Schmidt: May I comment on these various—just for a moment?

Judge Winkler: Of course.

Two moments, take all the time you want.

Mr. Schmidt: I, first of all, think that the parties are competent to agree to a settlement that undoes any special finding that the Regional Director may have made.

(641) That's number one.

Number two,—

Judge Winkler: Assuming that's so, would it take some special language to do it?

Mr. Schmidt: That's the next thing I was addressing myself to.

This issue arises today obviously because two sets of counsel on the other side of the table here think it's an important issue.

All my life as a lecturer in law, as a student in law and as a practicing attorney, whenever I signed a document I read

that document and made sure that it said everything that was—that it was supposed to say.

And if the document says without limitation the parties withdraw their respective challenges, I take it that they're adults, that they're learned in the law, that they know the meaning of the language, they said what they meant, and that's the end of it.

Otherwise it's a confession of utter ineptitude as a lawyer to sign a document like this.

Judge Winkler: I guess this is something I'll have to decide.

Off the record.

(Discussion off the record)

On the record.

APPENDIX L—Administrative Law Judge's Ruling and Order, Dated July 3, 1979.

JD-693-79

APPENDIX A

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Division of Judges

Washington, D. C.

JACQUES SYL KNITWEAR, Inc.
BIQUETTE, Inc.

and

LOCAL 162, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL—CIO

Cases Nos. 22-CA-8588, 22-CA-8655, 22-CA-8698, 22-CA-8713, 22-CA-8897, 22-RM-553

Ruling and Order

On September 18, 1978, [*] the Regional Director conducted an election in Case No. 22-RM-553, in which 36 ballots were challenged. In a Supplemental Decision issued

[*] This date should be: August 21, 1978.

on November 29, 1978, the Regional Director sustained challenges to 9 ballots and overruled challenges to 14 ballots, and he further determined that the ruling on the remaining 13 challenged ballots must await a hearing on objections filed by the Union. Neither the Respondent (Employer) nor the Union sought to appeal any of the Regional Director's rulings on challenges or objections, and these rulings are therefore "final" under Section 102.78 of the Board's Rules and Regulations.

A complaint having meanwhile been issued, the Regional Director issued an order on December 15, 1978, consolidating the unfair labor practices proceedings with the representation matters "for the purpose of hearing, ruling and decision by an Administrative Law Judge, as to the status of the remaining 13 unresolved challenged ballots . . . and the Union's Objections 1, 3, 4 and 6 filed therein . . ." A consolidated hearing began on March 26, 1979.

On April 17, 1979, and as recommended by the General Counsel, I approved a Settlement Agreement between Respondent and the Union. The Agreement disposed of the unfair labor practices allegations and further provided, *inter alia,* that "Case No. RM-533 be severed and returned for processing to the Regional Director, and *for purposes of settlement that the parties withdraw their respective challenges in* 22-RM-533 and that a revised tally of ballots be issued after the challenged ballots are opened and counted." (emphasis added)

By letter of April 23, 1979, the Regional Director notified the Respondent and the Union that the Settlement Agreement provided "for the parties' withdrawal of their respective challenges to the ballots of several individuals" and he further notified them that the ballots of 13 named individuals would accordingly be opened and counted at a designated time and place. Respondent, by telegram on April 25, protested the intention of the Regional Director

to open up and count only the 13 unresolved ballots and Respondent asserted that the parties had agreed that all challenges, not only unresolved challenges, be withdrawn and that all affected ballots be opened and counted.

On April 30, 1979, the General Counsel filed a motion to reopen the record and resume the hearing in this matter "based on Respondent's non-compliance" with the Settlement Agreement. The General Counsel submitted a supporting memorandum. Respondent filed an opposition, with supporting affidavits and memorandum, to the General Counsel's motion. Hearing on the General Counsel's motion was held on June 19, 1979.[1]

All counsel who participated in the settlment negotiations stated at the June 19 hearing that they had no discussion with opposing counsel respecting the scope of the phrase, "The parties withdraw their respective challenges," which appears in the Settlement Agreement. Respondent asserts that the phrase is "unqualified and unlimited" and that a plain reading of the phrase necessarily means, and that Respondent understood it to mean, all challenges, including those upon which the Regional Director had ruled. The General Counsel asserts just as positively that the phrase could not have been intended to embrace the challenges determined by the Regional Director because of the finality accorded such determinations absent an appeal.

Despite the General Counsel's "finality" contention, I believe it reasonable for Respondent to believe the Agreement to have contemplated the withdrawal of all challenges, both unresolved and resolved. Because of the "finality" consideration, however, I also consider it reasonable for the General Counsel and the Union to have understood the phrase to apply only to unresolved challenges.

---

[1]Another stated purpose of the hearing on that date was to clarify the matter of Respondent's representation respecting a telegram from one Samuel D. Rosen. Nothing further need be said in that connection, even though it led to an order issued by me on May 11, 1979, which order I, in effect, rescinded.

In the circumstances, I am thus impelled to conclude that there was "no meeting of the minds" when the Settlement Agreement was executed and I must therefore withdraw approval of the Settlement Agreement and reopen the case for further proceedings. *IATSE, LOCAL 659,* 197 NLRB 1187 (1972), 477 F.2d 450 (C.A. D.C., 1973).

It is accordingly ordered that the Settlement Agreement be inoperative and that hearing in this matter be resumed on July 24, 1979, at 9:30 a.m.

/s/ RALPH WINKLER
Administrative Law Judge

Dated: July 3, 1979

APPENDIX B

Candida Aguidero [Aguilera]
Estella Vallesteros
Nelsy Lopez
Maria Consuelo Ramires
Rosa Bacallao
Susan Torres
Rosa Martinez
Marina Penton
Beatriz Villalobos
Alicia Campoverde
Cleofe Astralaga
Ondina Pineiro
Gloria Vargas
Marta Amador
Adeida Diaz
Carmen Barcenas
Gilda Pereira
Gloria Rico
Migdalia Sanchez
Graciella Cepeda
Eldelmira Hernandez
Trinidad Guillermo
Madeline Collazo
Maria M. Colon
Aido Molina
Armanda Gonzalez
Mary Porta
Miriam Reyes
Luisa Valle
Lourdes M. Bacerril
Rosa Bonilla
Antonia Mezich
Pasqualina Santillo
Piedad Gallo
Candelaria Fernandez

APPENDIX C

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

Our employees have a right to join and support LOCAL 162, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL—CIO, and we will not violate any of our employees' rights under the National Labor Relations Act.

WE WILL NOT interrogate employees concerning their union membership and activities, and we will not engage in surveillance of such activities.

WE WILL NOT discharge employees or threaten to discharge them for union reasons, and we will not threaten to close or move our plant for union reasons or because employees engage in lawful strikes.

WE WILL take back to work all the strikers who have not returned and we will pay strikers for earnings they have lost since September 18, 1978, including all vacation payments we have withheld. WE WILL also take back Maria Colon, Aleida Diaz, Ondina Pineiro, Rosa Martinez, and Miriam Reyes and pay them for loss of earnings.

WE WILL recognize and bargain in good faith with LOCAL 162, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL—CIO.

JACQUES SYL KNITWEAR, INC.
BIQUETTE, INC.

(Employer)

Dated_____ By_____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Peter D. Rodino Jr. Federal Bldg.— Room 1600, 970 Broad St., Newark, N.J. 07102 (Telephone No. 201-645-3652)

APPENDIX M—NLBR Statements of Procedure, Section 101.9 (Settlement After Issuance of Complaint).

Sec. 101.9 *Settlement after issuance of complaint.*—(a) Even though formal proceedings have begun, the parties again have full opportunity at every stage to dispose of the case by amicable adjustment and in compliance with the law. Thus, after the complaint has been issued and a hearing scheduled or even begun, the attorney in charge of the case and the regional director afford all parties every opportunity for the submission and consideration of facts, argument, offers of settlement, or proposals of adjustment, except where time, the nature of the proceeding, and the public interest do not permit.

(b)(1) After the issuance of a complaint, the agency favors a formal settlement agreement, which is subject to the approval of the Board in Washington, D.C. In such an agreement, the parties agree to waive their right to hearing and agree further that the Board may issue an order requiring the respondent to take action appropriate to the terms of the settlement. Ordinarily the formal settlement agreement also contains the respondent's consent to the Board's application for the entry of a decree by the appropriate circuit court of appeals enforcing the Board's order.

(2) In some cases, however, the regional director, pursuant to his authority to withdraw the complaint before the hearing (section 102.18), may conclude that an informal settlement agreement of the type described in section 101.7 is appropriate. Such agreement is not subject to approval by the Board and does not provide for a Board order. It provides for the withdrawal of the complaint.

(c)(1) If after issuance of complaint but before opening of the hearing, the charging party will not join in a settlement tentatively agreed upon by the regional director, the

respondent, and any other parties whose consent may be required, the regional director serves a copy of the proposed settlement agreement on the charging party with a brief written statement of the reasons for proposing its approval. Within 5 days after service of these documents, the charging party may file with the regional director a written statement of any objections by the proposed settlement. Such objections will be considered by the regional director in determining whether to approve the proposed settlement. If the settlement is approved by the regional director notwithstanding the objections, the charging party is so informed and provided a brief written statement of the reasons for the approval.

(2) If the settlement agreement approved by the regional director is a formal one, providing for the entry of a Board order, the settlement agreement together with the charging party's objections and the regional director's written statements, are submitted to Washington, D.C., where they are reviewed by the general counsel. If the general counsel decides to approve the settlement agreement, he shall so inform the charging party and submit the agreement and accompanying documents to the Board, upon whose approval the settlement is contingent. Within 7 days after service of notice of submission of the settlement agreement to the Board, the charging party may file with the Board in Washington, D.C., a further statement in support of his objections to the settlement agreement.

(2) If the settlement agreement approved by the regional director is an informal one, providing for the withdrawal of the complaint, the charging party may appeal the regional director's action to the general counsel, as provided in section 102.19 of the rules and regulations.

(d)(1) If the settlement occurs after the opening of the hearing and before issuance of the administrative law judge's decision and there is an all-party informal settlement, the request for withdrawal of the complaint must be

submitted to the administrative law judge for his approval. If the all-party settlement is a formal one, final approval must come from the Board. If any party will not join in the settlement agreed to by the other parties, the administrative law judge will give such party an opportunity to state on the record or in writing its reasons for opposing the settlement.

(2) If the administrative law judge decides to accept or reject the proposed settlement, any party aggrieved by such ruling may ask for leave to appeal to the Board as provided in section 102.26.

(e)(1) In the event the respondent fails to comply with the terms of a settlement stipulation, upon which a board order and court decree are based, the Board may petition the court to adjudge the respondent in contempt. If the respondent refuses to comply with the terms of a stipulation settlement providing solely for the entry of a Board order, the Board may petition the court for enforcement of its order, pursuant to section 10 of the National Labor Relations Act.

(2) In the event the respondent fails to comply with the terms of an informal settlement agreement, the regional director may set the agreement aside and institute further proceedings.

Opposition

No. 81-1166

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In the Supreme Court of the United States

OCTOBER TERM, 1981

JACQUES SYL KNITWEAR, INC., AND
BIQUETTE, INC., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD AND LOCAL 162,
INTERNATIONAL LADIES' GARMENT WORKERS' UNION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board properly set aside the settlement agreement and proceeded to determine the representation and unfair labor practice issues in this case.

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1a-3a) is unreported. The decisions and orders of the National Labor Relations Board (Pet. App. 4a-38a, 39a-53a) are reported at 247 N.L.R.B. No. 191 and 254 N.L.R.B. No. 150, respectively.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 1981. The petition for a writ of certiorari was filed on December 21, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Jacques Syl, Inc., and Biquette, Inc. ("the Company") are affiliated businesses with common officers, directors and stockholders (Pet. App. 6a). Jacques Syl manufactures children's garments and Biquette ships those garments to the Company's customers (*ibid.*). In May 1978, Local 162, International Ladies' Garment Workers' Union ("the Union") began an organizational campaign among the Company's production and maintenance employees. The Union obtained authorization cards from a majority of the Company's employees and filed an election petition with the Board (*id.* at 5a, 17a, 34a). On August 21, 1978, the Board conducted an election at the Company in which 21 votes were cast for the Union and 24 against; 36 of the ballots were challenged (*id.* at 5a).

On November 29, 1978, the Board's Regional Director issued a decision in which he overruled the challenges to 14 ballots and sustained 9 challenges, but was unable to resolve the challenges to 13 ballots without a hearing. The decision stated that, pursuant to Section 102.78 of the Board's Rules and Regulations (29 C.F.R. 102.78), the rulings of the Regional Director would be "final" unless the Board granted special permission to appeal therefrom (Pet. App. 86a-87a). Neither the Company nor the Union sought to appeal the Regional Director's disposition of the 23 challenged ballots (*id.* at 87a).

2. While the representation case was proceeding, the Board's General Counsel issued an unfair labor practice complaint against the Company as a result of the Union's charges that the Company had committed unfair labor practices during the organizational campaign. The unfair labor practice case and the representation case were consolidated for hearing before an Administrative Law Judge (ALJ). On April 17, 1979, during the course of the hearing, the parties executed, and the ALJ approved, a settlement

agreement disposing of the representation and unfair labor practice issues (Pet. App. 57a-61a). The agreement provided, *inter alia*, that the representation case, which involved the challenged ballots in the election, "be severed and returned for processing to the Regional Director, and for purposes of settlement that the parties withdraw their respective challenges * * * and that a revised tally of ballots be issued after the challenged ballots are opened and counted" (*id.* at 61a).

On April 23, 1979, the Regional Director notified the Company and the Union that, pursuant to the terms of the settlement agreement, the 13 unresolved challenged ballots would be opened and counted on April 26 (Pet. App. 65a-66a). On April 25, the Company sent a telegram to the Regional Director in which it protested his intention to open and count only the 13 unresolved challenged ballots, stating that the Company had agreed to "withdraw all challenges" in the representation case, including the 23 challenges previously disposed of in the Regional Director's November 29 decision (*id.* at 87a-88a).

Thereafter, the General Counsel filed a motion to withdraw the settlement agreement and reopen the hearing, asserting that the Company's insistence that all the challenged ballots be opened constituted noncompliance with the settlement agreement (Pet. App. 67a-71a). The Company opposed the motion, contending that the settlement referred to all 36 challenged ballots, including the 23 that had been finally resolved by the Regional Director. The ALJ ordered a hearing on the issues raised by the Company's opposition to the motion to set aside the settlement agreement (Pet. App. 74a-75a).

After hearing the contentions of the parties, the ALJ concluded that the assertions of both the General Counsel and the Company as to the proper interpretation of the settlement agreement were "reasonable" (Pet. App. 88a).

The ALJ therefore concluded that "there was 'no meeting of the minds' when the settlement agreement was executed" (*id.* at 89a), and he accordingly withdrew approval of the agreement and reopened the proceeding for further hearings (*ibid.*). The Board denied the Company's request for permission to appeal the ALJ's order (C.A. App. 594).[1]

3. In the recommenced unfair labor practice proceeding, the Board, upholding the findings of the ALJ, concluded that the Company had violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by coercively interrogating employees concerning their union membership and activities, thus creating the impression that it was keeping employees' union activities under surveillance, and by threatening employees with plant closure and other reprisals to discourage their union activities, assaulting union organizers in the presence of striking employees, promising employees additional pay to abandon the strike, warning its employees of the futility of union membership, and threatening the unfair labor practice strikers with permanent replacement. The Board found that the Company also had violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by refusing to pay employees accrued vacation pay because they were on strike, by discharging five striking employees, and by refusing to reinstate unfair labor practice strikers upon their unconditional offer to return to work (Pet. App. 26a-27a).

In addition, the Board sustained the challenges to 8 of the contested ballots and overruled the challenges to 5. Counting of those ballots resulted in an election victory for the Union, which was then certified as bargaining agent by the

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[1] "C.A. App." refers to the appendix in the court of appeals.

Board (Pet. App. 42a-43a). The Company's refusal to bargain was found by the Board, in a subsequent unfair labor practice proceeding, to be violative of Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1) (Pet. App. 46a).

The court of appeals upheld the Board's decisions and enforced its orders (Pet. App. 1a-3a). The court rejected the Company's contention that the settlement should not have been withdrawn, concluding that "[t]he finding that there was no meeting of the minds on the terms of the settlement is supported by substantial evidence in the record as a whole" (*id.* at 2a-3a).

ARGUMENT

The Company contends (Pet. 11) that the Board improperly withdrew the settlement agreement, asserting that the Board has no statutory authority to rescind such agreements and that it was denied a fair hearing on the issue. There is no merit to these claims and they raise no issue warranting review by this Court.

Informal settlements, such as the one at issue here, provide for discontinuance of the General Counsel's prosecution in exchange for the respondent's compliance with the substantive terms of the settlement.[2] This Court has approved the Board's long-standing policy of setting aside settlement agreements that fail to accomplish their purpose. See *Wallace Corp.* v. *NLRB*, 323 U.S. 248, 254-255 (1944). See also *International Photographers, Etc.*, 197 N.L.R.B. 1187, 1187-1188, (1972), enforced, 477 F. 2d 450 (D.C. Cir. 1973) (table), cert. denied, 414 U.S. 1157 (1974).

The hearing held by the ALJ plainly comported with the requirements of due process. Thus, the ALJ issued an order notifying the parties that there would be a hearing on the

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[2]Under the Board's regulations, informal settlements do not provide for entry of a Board order or court judgment. 29 C.F.R. 101.7, 101.9(b)(2).

issues raised by the Company's counsel regarding the settlement (Pet. App. 74a-75a). Thereafter, a hearing was held to determine the parties' understanding of the settlement agreement language; at the hearing all parties to the settlement testified as to their understanding of its terms. The ALJ explained the basis for his decision, and the court of appeals concluded that his finding was supported by substantial evidence. Accordingly, the only issue actually presented is whether the ALJ correctly found that there was no meeting of the minds as to the effect of the settlement agreement here.[3] Further review of this fact-bound issue is unwarranted. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 496 (1951).

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[3]There is no merit to the Company's additional contention (Pet. 12-14) that it had a "property" interest in the settlement agreement. The setting aside of the settlement agreement does not result in the deprivation of any legal interest of a party charged with committing unfair labor practices; rather, the only consequence is that the Board complaint is reinstated and the Board hearing reopened, with the General Counsel bearing the burden of establishing the respondent's commission of the charged unfair labor practices. See Section 10(c) of the Act, 29 U.S.C. 160(c); 29 C.F.R. 101.10(b). In any event, even if the Company had a "property" interest in the settlement agreement, we have shown that the procedures by which that agreement was set aside satisfied the requirements of due process.

The Company further errs in asserting (Pet. 14-16) that contract principles govern the propriety of setting aside Board settlements. As the Fourth Circuit noted in *George Banta Co.*, v. *NLRB*, 604 F. 2d 830, 835-836 (1979), cert. denied, 445 U.S. 927 (1980), the "[d]isposition of unfair labor practice charges [pursuant to settlement] involves not simply an adjustment of the rights of private parties, but also a broader public interest," and it is the "ultimate responsibility of the agency * * * to ensure that the public interest is served by a settlement * * *." Accordingly, "general contract law principles [do not] alone govern this issue." See also *Wallace Corp.* v. *NLRB*, *supra*, 323 U.S. at 254-255. In any event, the ALJ's ruling accorded with traditional contract law principles. See, *e.g.*, 1 *Corbin on Contracts* § 104, at 465-466 (1963) ("* * * if the parties had materially different meanings [of the language], and neither one knew or had reason to know the meaning of the other, there is no contract").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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